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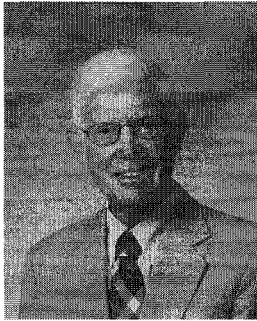
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JOHN B. ANDERSON: THE EXEMPLARY DARK HORSE⁺

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+ The information about John B. Anderson is the result of the Shepard Broad Law Center supporting a project on oral history and law. A team comprised of Law Professors, Olympia Duhart and Charlene L. Smith; Deborah McGovern, who was head of Emerging Technologies, Reference and Instructional Services Librarian; Chad Moulder and Ray Andrade, who are technical experts; and three wonderful students: Jamie Rodriguez, Greg Powowitz, and London Ott; filmed Professor Anderson for about fifteen hours. They also filmed Senator George McGovern. A documentary resulted and was partially shown at the December 2008, Law & Society meeting in Denver, Colorado. The DVD is now available on the Law Center's Library web site: http://www.nsulaw.nova.edu/library_tech/library/resources/local/index.cfm. Professor Anderson and Senator McGovern also gave a fireside chat at the Shepard Broad Law Center on March 26, 2009. The authors wish to thank Mark Bisnow for providing the inspiration for the article's title. See generally MARK BISNOW, DIARY OF A DARK HORSE: THE 1980 ANDERSON PRESIDENTIAL CAMPAIGN (1983).

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One research assistant, Andrew Almand, assisted with insight and expertise in footnotes and Brian Skornicki, who came to the project late, finished the footnotes in an area that he had to learn from the ground up. This article demonstrates what valuable help research assistants can be. It must be noted that Mr. Almand continued helping even though he transferred to William and Mary Law School after a stellar first year. Thank you both.

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I. INTRODUCTION

John B. Anderson, an Independent candidate for the 1980 presidential election, represents the model of the civic minded professional. Anderson typifies what a powerful person’s focus should be, social justice. He grounds himself in participatory democracy and acts in a very collaborative manner. His professional behavior exemplifies what many in the social sciences would like to be the standard in the political and social scene. Instead, the world, for the most part, is populated by professionals who have evolved into technocrats and are basically driven by the markets and individualism closely associated with the market place. This article will explore Anderson’s “story” to see what influenced him, as an “insider,” to be a supporter of outsider rights. The authors fully realize his story turns outsider jurisprudence on its

head.¹ Regardless, and perhaps for this reason, the John B. Anderson story is worthy of emulation.

The article will begin with an exploration of Anderson's fascinating life story. Following that will be a look at Anderson from the point of view of another great person, George McGovern, a long time friend of Anderson. After that, begins an examination of the concept of civic professionalism, which represents a new method to view behaviors that promote social justice. That will be followed by a review of how Anderson's up-bringing and attitudes might explain why Anderson became a civic professional. Lastly, outsider jurisprudence gives insight to Anderson's political and legal philosophy.

1. Traditionally, an "outsider," in this context, is "someone who does not have access to the channels of power and communication in this society" whereas, "an 'insider' is someone who does have that access." Carolyn Grose, *'Once upon a Time, in a Land Far, Far Away . . .'* *Lawyers and Clients Telling Stories About Ethics (and Everything Else)*, 20 HASTINGS WOMEN'S L.J. 163, 173 n.29 (2009). All too often, those outside the discourse are not represented nor are their voices heard. See *id.* at 173. At its most basic form, Outsider Jurisprudence describes the movement of nonwhite legal theory which essentially:

[I]ncludes Critical Legal Studies, Feminist Critical Legal Theory, Critical Race Theory, Critical Race Feminism, Asian American legal scholarship and, more recently, QueerCrit and Lat-Crit theory. These genres of outsider jurisprudence have in common an outsider, and often times critical, perspective vis-à-vis law and society. These loosely related strains of outsider scholarship have striven to: represent marginalized viewpoints; espouse critical, egalitarian, progressive and diverse anti-subordination agendas; accept analytical inter-subjectivity; raise political consciousness and social responsibility; recognize and work with postmodernism; favor praxis; and seek community.

Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377, 377–78 n.4 (2002) (citing Francisco Valdes, *Afterword, Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999)). "[O]utsider scholarship is characterized by a commitment to the interests of people of color and/or women, by rejection of abstraction and dispassionate 'objectivity,' and by a preference for narrative and other engaged forms of discourse." Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 685 (1992). An outsider holds views not held by the mainstream and, according to this theory, would not be part of the mainstream. See, e.g., Rachel J. Anderson, *From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews*, 20 HASTINGS WOMEN'S L.J. 197, 207 (2009); see also Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 J. LEGAL WRITING INST. 17, 26 (2008) (discussing how, in Outsider Jurisprudence, the consensus is that "lawmaking reflects dominant ideologies"). As this article will explore, John B. Anderson—though he does not fit the mold—breaks through these traditional notions and causes us to reexamine that even a consummate "insider" can champion the outsiders' cause.

II. JOHN B. ANDERSON'S BIOGRAPHY

A. *Before He Was a Congressman*

Anderson, the son of an immigrant father, was born in Rockford, Illinois in 1922.² With a younger sister in tow, Anderson's father, as a fifteen year old, left their home country, Sweden.³ Eventually, the entire family was united in Rockford.⁴ As Anderson's family tells the story, they took the train from Chicago and ended in the farthest point west, which at that time was Rockford, Illinois.⁵

The town would not have been considered small in 1922.⁶ With a population of 65,651 people, Rockford was comparable to the slightly larger city

2. Transcript of John B. Anderson: An Oral History and Biography, at 29:4–5, 33:21–23 (Rec'd. Apr. 2009) [hereinafter Anderson Transcript I]; Biographical Directory of the United States Congress, John Bayard Anderson, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000195> (last visited Feb. 26, 2010). Anderson's father became a naturalized citizen who faithfully embraced his duties as a citizen and enjoyed his son's interest in politics. Anderson Transcript I, *supra* at 33:21–23.

3. *Id.* at 2:12–14; Transcript of John B. Anderson: An Oral History and Biography, at 5 (Rec'd June 2009) [hereinafter Anderson Transcript II].

4. Anderson Transcript I, *supra* note 2, at 2:14–16. According to Rockford Historian Jon Lundin, "[T]he Swedes were a force to be reckoned with as early as the 1870s, when their population was estimated to be . . . 25 percent of the city total." JON W. LUNDIN, ROCKFORD: AN ILLUSTRATED HISTORY 67 (1989). According to the 1930 U.S. Census, Swedish immigration to Rockford would continue to peak for another fifty years, culminating at forty percent of the total population of Rockford. *See id.* By that time, Rockford had acquired the identification as a "Swede Town," as "Rockford Swedes occupied the office of both mayor and chief of police . . . [and] controlled three national banks." *Id.*

5. Anderson Transcript I, *supra* note 2, at 2:17–23. Anderson says that his family's settlement in Rockford was around the turn of the 20th century. *Id.* at 2:18. Since the town was the farthest west the trains went from Chicago, "it was a logical place to stop and get off." *Id.* at 2:20–23. Indeed, there is documented support for the Anderson family lore. Historian Jon Lundin further explains, "[T]he truth is that the first immigrants landed in Rockford more or less by accident, having decided to ride the train westward as far as it would go. When they boarded the Galena & Chicago Union . . . in 1852, the end of the line was [downtown Rockford]." LUNDIN, *supra* note 4, at 68. However, as early as the mid 1850s, the Chicago and Northwestern Railroad—constructed by the Galena and Chicago Union Railroad Company—ran straight through Rockford as far west as Dubuque, Iowa. *See id.* at 67–68; Ruth Ann Montgomery, *Evansville's Railroads*, <http://www.evansvillehistory.net/RAILROAD.html> (last visited Feb. 26, 2010).

6. Rockford's population was 5332 people shy of making the U.S. Census' list of 100 largest Urban Places in America in 1920, falling to the city of South Bend, Indiana. *See* U.S. CENSUS BUREAU, POPULATION OF THE 100 LARGEST URBAN PLACES: 1920, tbl. 15, available at <http://www.census.gov/population/www/documentation/twps0027/tab15.txt>; U.S. CENSUS BUREAU, POPULATION: 1920, tbl. 51, available at <http://www2.census.gov/prod/decennial/documents/41084484v1ch2.pdf>.

of San Diego, California during that time.⁷ Anderson certainly thought it seemed quite large, but he admits he was pretty innocent in terms of what the world had to offer.⁸ However, his trip to the 1933 Chicago World's Fair at age eleven elicited a description of a "mad adventure."⁹

His life revolved around his family, which he describes as close-knit.¹⁰ Anderson was one of six children, only three of whom survived childhood diseases.¹¹ He characterizes his parents as "protective."¹² He said his early

7. U.S. CENSUS BUREAU, POPULATION: 1920, *supra* note 6, at tbl. 51. Anderson recalls the population to be about 90,000 people. Anderson Transcript I, *supra* note 2, at 1:8–10. However, the 1920 U.S. Census indicates that Rockford was inhabited by 65,651 people. U.S. CENSUS BUREAU, POPULATION: 1920, *supra* note 6, at tbl. 51. Perhaps Anderson was referring to the population of Winnebago County, Illinois, the county seat of Rockford, which had an indicated population in 1920 of 90,929 people. *See id.* at tbl. 50. Additionally, the City of San Diego, California at that time had an indicated population of 74,683 people, making the two cities comparable. *Id.* at tbl. 51.

8. *See* Anderson Transcript I, *supra* note 2, at 1:13–14. Anderson recalls only ever making an occasional trip by train out of Rockford as a child. *Id.* at 1:14–16.

9. *Id.* at 1:14–18. As the story goes, in 1933 and 1934 the Chicago's World's Fair, known as "A Century of Progress," was conceived as a 100 year anniversary commemorating the city of Chicago and as a testament to the industrial and scientific achievements up to that time. Chicago Historical Society, History Files: Century of Progress 1933–34, <http://www.chicagohs.org/history/century.html> (last visited Feb. 26, 2010).

The fair was opened on May 27, 1933, when the lights were turned on with energy from the rays of the star Arcturus. The rays were focused on photo-electric cells in a series of astronomical observatories and then transformed into electrical energy which was transmitted to Chicago. Unlike any [other] fair before it, A Century of Progress . . . focused on scientific and technological progress and the manufacturing processes behind them, [rather than on architecture]. The "A Century of Progress Exposition" was a[n] unheralded success and hosted over 48 million visitors in [the] two years it ran. It provided an uplifting glimpse into a future embodied by technology while honoring the achievements of past.

1933–1934 World's Fair, <http://www.futurliner.org/fair.htm> (last visited Feb. 25, 2010). Thus, it is no wonder that Anderson perceived the experience to be a "mad adventure." Anderson Transcript I, *supra* note 2, at 1:17–18.

10. Anderson Transcript I, *supra* note 2, at 1:24.

11. *Id.* at 1:25–2:3. Before Anderson was born in 1922, three of his siblings had succumbed to diseases, one of whom was a victim of the 1918 influenza pandemic that swept the globe killing, by some accounts, 2.5% to 5% of the world's total population. *See* Anderson Transcript II, *supra* note 3, at 5; virus.stanford.edu, The Influenza Pandemic of 1918, <http://virus.stanford.edu/uda> (last visited Feb. 25, 2010). Additionally in the 1920s, many of the common childhood diseases, such as measles, mumps, and rubella, which today can be readily inoculated, lacked a vaccine and thus were quite harmful or fatal during the pre-immunization period. *See* MINISTRY OF HEALTH OF WELLINGTON, N.Z., IMMUNISATION HANDBOOK 2006, at 207, 225, 230. It was not until the early 1970s that a triple vaccine for the mumps, measles, and rubella (MMR) was introduced to U.S. pediatricians. *Id.* at 230. However, the more serious viral threat to children, both in the past and presently, continues to be diphtheria. *See id.* at 142–43. Diphtheria is acquired almost exclusively in children under the age of fifteen and has had a ten percent mortality rate in the United States since 1920. *Id.* at 143.

life focused on three institutions: the family, the church, and the school.¹³ His family life was impacted by what his father did to make a living.¹⁴

Anderson's father owned a grocery store, and Anderson remembers the extent of his own responsibilities as sacking potatoes, stocking shelves, and carrying out bags of groceries for ladies.¹⁵ Financially wiped out during the Great Depression,¹⁶ his father moved the family to Wisconsin and switched to owning a dry goods store.¹⁷ After about a year of effort, that venture too was unsuccessful and Anderson's father moved the family back to Rockford and went back to owning a grocery store.¹⁸

B. *Early Role Models*

Notably, Anderson's early role models were teachers and professors.¹⁹ Miss Vincent, one of Anderson's grade school teachers, enabled him to skip fifth grade because she considered him so intelligent.²⁰ This allowed him to graduate one year earlier than most other students.²¹ In high school, Anderson looked up to his debate coach, John V. Berland, "as a kind of a father

12. Anderson Transcript I, *supra* note 2, at 2:4–6; Anderson Transcript II, *supra* note 3, at 5. Anderson proffers that the overly protective nature of his parents was likely a result of the childhood deaths of three of his siblings. Anderson Transcript I, *supra* note 2, at 2:4–6; Anderson Transcript II, *supra* note 3, at 5. He recalls that his father was particularly distraught from the loss of three of his children and, being as devout as he was, would make regular visits to their gravesites. Anderson Transcript II, *supra* note 3, at 5.

13. Anderson Transcript I, *supra* note 2, at 2:24–3:3. Anderson perceived these three institutions to have been the most formative in his upbringing. *Id.* at 3:4–7.

14. *Id.* at 3:19–21. As a child, Anderson recalls that he "pretty much grew up behind the counter in [his] father's store," as it "was the place to which [he] retreated after school and on weekends." *Id.*

15. *Id.* at 3:21–24.

16. Anderson Transcript I, *supra* note 2, at 3:9–12. By 1930, approximately 11.4% of the eligible male workforce in Rockford, Illinois was laid off or unemployed. BUREAU OF THE CENSUS, FIFTEEN CENSUS OF THE UNITED STATES: 1930 UNEMPLOYMENT, VOL. I, SEC. 3, ILLINOIS, at 306 [hereinafter 1930 CENSUS].

17. Anderson Transcript II, *supra* note 3, at 7. While Anderson's father was pursuing every opportunity simply to make ends meet, Anderson himself admits that he was happy as a clam moving to the little town of Genoa City, Wisconsin with virtually no concept of the poverty that permeated through to the rest of his family. *Id.* During the year away from Rockford, Anderson quickly made friends and remembers learning how to ride a horse. *Id.* He even recollects stealing a cabbage or two from storage bins that lined the railroad tracks where farmers would leave their intended shipments. *Id.* Anderson recalls the accompanying naughty, but nice feeling of bringing home a few cabbages for the family. *Id.*

18. See Anderson Transcript I, *supra* note 2, at 3:9–14.

19. *Id.* at 14:12–13.

20. *Id.* at 14:13–20.

21. *Id.* at 14:20–23.

figure.”²² Anderson even remembers several of the specific debate subjects, such as nationalizing the railroads and just as the war clouds were collecting over Europe, whether to form an Anglo-American alliance.²³ Mr. Berland also taught government, Anderson’s favorite subject.²⁴ At the University of Illinois, his debate coach and political science teacher there, Professor Al Houston, served as his mentor.²⁵ These two men inspired Anderson to become a public servant, and he feels that the two deserve “a great deal of credit for steering [him] in that direction.”²⁶ He says he learned from them to see both sides of issues, and that you had “to put yourself into the shoes or into the mind of the person who was taking the other side.”²⁷

C. *Years After High School*

Much of Anderson’s early life was spent in Illinois.²⁸ When Anderson graduated from high school,²⁹ he went to the University of Illinois and then began law school upon completion of his A.B. degree.³⁰ Before he could finish law school, World War II commenced.³¹ He postponed his legal education and joined the Army, fighting in four overseas campaigns in Europe.³²

22. *Id.* at 14:24–15:2. These educators obviously had a profound effect on Anderson’s development as he remembers all their names with exceptional ease. See Anderson Transcript I, *supra* note 2, at 14:14–15:2.

23. *Id.* at 15:5–12. Anderson recalls debating these issues in 1939. *Id.* at 15:5.

24. *Id.* at 15:13–15. Anderson would go on to major in political science while attending the University of Illinois. *Id.* at 15:21–24.

25. Anderson Transcript I, *supra* note 2, at 15:19–21. Regrettably, Professor Al Houston “lost his life as an artillery officer in World War II.” *Id.* at 15:20–21.

26. *Id.* at 15:25–16:5.

27. *Id.* at 16:10–16:17.

28. *Id.* at 4:25–5:2.

29. Anderson graduated from Rockford High School in 1939. Biographical Directory of the United States Congress, John Bayard Anderson, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000195> (last visited Feb. 24, 2010) [hereinafter Biographical Directory, John Bayard Anderson]. Anderson remembers that his high school had 789 students in his graduating class, and that there was only one black student enrolled in the entire high school. Anderson Transcript I, *supra* note 2, at 32:22–25. As Anderson explained it, while the occurrence was not a result of de jure segregation, Rockford High School “was certainly de facto segregat[ed].” *Id.* at 33:1–2.

30. *Id.* at 5:1–3. Anderson attended the University of Illinois located in Urbana, Illinois and received his A.B. degree in 1942. Biographical Directory, John Bayard Anderson, *supra* note 29.

31. Anderson Transcript I, *supra* note 2, at 5:3–4.

32. *Id.* at 5:3–5. One of the campaigns Anderson remembers most vividly was the Siege of Bastogne in Belgium as part of the larger Battle of the Bulge. Anderson Transcript II, *supra* note 3, at 8. As the story goes, German forces had been marching west into the Allied territory toward Antwerp, Belgium so that the Germans could halt supply shipments between

After the war's end, he finished his law degree³³ and practiced in a small firm in Rockford.³⁴

Eventually Anderson, dissatisfied with practicing and perhaps a bit "restless" at that time of his life,³⁵ decided to study more law so that he could perhaps become a law professor.³⁶ With that goal in mind, he applied to Harvard's LLM program and was admitted.³⁷ When he completed his LLM,

American and British forces; the small Belgian city of Bastogne was an area where many of the supply roads to Antwerp came to a junction. COLONEL S.L.A. MARSHALL, *BASTOGNE: THE FIRST EIGHT DAYS 15-18* (1946). Thus, Allied protection of the city was necessary to prevent the supply line from being compromised and, from the German perspective, securing the city was essential to reaching and destroying the Allied supply lines. *Id.* As Anderson explains his experience,

[I] was driving a command car, a huge cumbersome vehicle that was a gas-guzzler if you ever saw one . . . with a major who was the chief liaison officer between the Third Corp Artillery Headquarters Battery . . . [however,] the only occasion in the ten months that I spent overseas where I actually saw the ultimate horror of war [was at Bastogne], displayed in the form of dead soldiers, German soldiers lying on the frozen ground as we would go in and out of the city where they had been killed by enemy fire—the allied fire.

Anderson Transcript II, *supra* note 3, at 8.

33. Anderson Transcript I, *supra* note 2, at 5:6-7. Anderson returned from the European Theater and finished his legal education at the University of Illinois College of Law in 1946. *Id.* at 5:4-7.

34. *Id.* at 5:8-9. In fact, when he finished law school, Anderson claims he was sought out by the firm Large, Reno & Champ, now Reno & Zahm. Anderson Transcript II, *supra* note 3, at 8. According to Anderson, he had been noticed by the firm while speaking at a Lion's Club luncheon during the time he was still a student at the University of Illinois. *Id.* The senior partner at the time, Guy Reno, had been so impressed that, upon learning Anderson had returned to Rockford, called him in for an interview. *Id.*

35. Anderson Transcript I, *supra* note 2, at 17:16-19. Anderson soon "found the practice rather dull and mundane." Anderson Transcript II, *supra* note 3, at 9. The principal job he was given was to read abstracts of title and research transfers of title. *Id.* at 8. Incessant visits to the County's Recorder of Deeds office were not the activities Anderson found to be congruent with the skills he perceived he possessed as a lawyer. *Id.* at 8-9. As it would turn out, Anderson's flair for public speaking would enable him to convince many juries later on as the State's Attorney for Winnebago County. Anderson Transcript I, *supra* note 2, at 7:17-19, 18:20-19:2.

36. *Id.* at 17:16-19. Anderson recalled pondering whether "[he] would find law more satisfying to teach than to practice." *Id.*

37. *Id.* at 5:13-19. While Anderson was attending Harvard, he had Archibald Cox, a very famous figure in American history, as a law professor. *Id.* at 5:13-17. Cox is most well known as the special prosecutor during the Watergate proceedings, who was eventually fired by Robert Bork at President Richard Nixon's request during an event known as the "Saturday Night Massacre." U.S. Dep't of Justice: Archibald Cox, Solicitor General, http://www.justice.gov/osg/aboutosg/a_cox_bio.htm (last visited Feb. 24, 2010). Further, Cox had earned distinction "as one of the leading law educators of the 20th century" during his teaching career at both Harvard Law School and Boston University School of Law. *Id.* It was also during Cox's tenure as a Harvard law professor that he became an advisor and speech writer for then-Senator John F. Kennedy. *Id.*

his only teaching offer came from Missoula, Montana.³⁸ After some research, and after looking at a map, Anderson decided Missoula would be a lonely place.³⁹ Anderson declined the offer.⁴⁰ Instead, Anderson reluctantly chose to stay and open up a law practice in Rockford: Anderson and Halleck.⁴¹ However, Anderson was still not satisfied with merely practicing law.⁴²

Because of his dissatisfaction, another phase of Anderson's careers began.⁴³ He took the Foreign Service exam, was accepted and went to Washington D.C. to study at the Foreign Service Institute for three months.⁴⁴ He was promptly commissioned as a Foreign Service Officer Class VI and sent to West Berlin.⁴⁵

At this juncture, it is best to take a bit of a side trip because it impacts his future decisions: how Anderson met his wife, Keke.

In Anderson's words, "that's a very interesting tale. And it was by her design, I'm sure."⁴⁶ Keke Machakos, at age eighteen, was working for the

38. Anderson Transcript I, *supra* note 2, at 5:20–22. The University of Montana Law School is located in Missoula. University of Montana School of Law, <http://www.umt.edu/law> (last visited Feb. 24, 2010).

39. Anderson Transcript I, *supra* note 2, at 5:22–23.

40. *See id.* at 5:24–6:2. Anderson quipped, "even though [it was] the home of Mike Mansfield." *Id.* at 5:24–25. Mike Mansfield, a Democratic Representative and Senator from Montana, was the longest serving Senate Majority leader in U.S. History from 1961–1977. Biographical Directory of the United States Congress, Michael Joseph Mansfield, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000113> (last visited Feb. 24, 2010). Known for his dedication to and promotion of U.S. and Asia relations, President Jimmy Carter appointed Senator Mansfield to be the United States Ambassador Extraordinary and Plenipotentiary to Japan, where he also became the longest serving in that position from 1977–1988. *Id.*

41. Anderson Transcript I, *supra* note 2, at 6:3–5.

42. *See id.* at 6:6–7.

43. *See id.* at 6:8–12.

44. *Id.* The subject-matter of the three-month course Anderson attended at the Foreign Service Institute was "[H]ow to be a Foreign Service Officer." *Id.* at 50:12–15.

45. *Id.* at 6:11–12. Berlin was arguably the prime international center of the Cold War, which lasted from 1949 to 1990. *See* ALEXANDRA RICHIE, *FAUST'S METROPOLIS: A HISTORY OF BERLIN*, 604, 674 (1998). The city was divided into East and West sections with American, French and British Sectors occupying the westernmost part of the city, and with the Soviets occupying the easternmost half of the city. *See id.* at 628. It is suggested that Berlin's political status and geographic position have provided the continuous opportunity for conflict located within the city to be capable of starting a world war. *See id.* at 659–60, 674. Thus, Anderson's role as an American, and likely also true of any British, French, or even Soviet soldier, was likely to ensure stability in what was perceived at the time as the world's most violent and volatile city. *See id.* at 631–32, 635–36.

46. Anderson Transcript I, *supra* note 2, at 50:11–12.

State Department in Washington D.C. as a photographer.⁴⁷ One day she saw Anderson at the bus stop and somehow found out that he would be visiting the department in which she worked in order to get his Foreign Service Officer photo.⁴⁸ As suspected, Anderson went to have his photo taken, but he did not really pay much attention to Keke.⁴⁹ So, according to Anderson, she later called to inform him that his photo had not turned out well and he would have to come back for another sitting.⁵⁰ This time he noticed who was behind the camera, asked her where she lived, and discovered that they lived in the same neighborhood.⁵¹ He asked her out to dinner and “she accepted [his] invitation with great alacrity and the romance blossomed and flowered from that moment forward.”⁵²

Unfortunately, Anderson was assigned to go to West Berlin soon thereafter.⁵³ Thus, the romance “was reduced to a frantic exchange of overseas mail and letters.”⁵⁴ He even admitted in one of his letters that he “was so desperately lonely that [he] could not survive unless she would come over.”⁵⁵ However, Keke told him she was “not about to invest her own paycheck in buying a ticket.”⁵⁶ Anderson quickly wired her the money.⁵⁷

The moment she stepped off the plane, he proposed and she accepted.⁵⁸ According to Anderson, he married Keke three times.⁵⁹ The first marriage was by the German Standesamt, the governmental agency where he obtained the license and had to make a declaration of marriage, then by a “fallen” Presbyterian minister, who worked in the same office as Anderson, and finally, with Keke’s mother in attendance, in a Greek Orthodox Church in Munich which was 400 miles away.⁶⁰

47. *Id.* at 50:16–18; 51:3–7.

48. *Id.* at 51:3–7.

49. *Id.* at 51:15–17.

50. *Id.* at 51:17–19.

51. Anderson Transcript I, *supra* note 2, at 51:20–23.

52. *Id.* at 51:23–52:1.

53. *Id.* at 52:2–4.

54. *Id.* at 52:9–10.

55. *Id.* at 52:11–12.

56. Anderson Transcript I, *supra* note 2, at 52:13–14. Keke had replied to Anderson’s plea with, “well, in that case, send the money.” *Id.* at 52:13.

57. *Id.* at 52:15.

58. *Id.* at 52:16–18.

59. *Id.* at 52:25–53:2.

60. Anderson Transcript I, *supra* note 2, at 52:24–53:15. As Anderson described his fellow Foreign Service Officer who married him to Keke, he “was an ordained Presbyterian minister who had kind of fallen away from the church . . . but he still had his license, so he could marry us.” *Id.* at 52:20–23.

The first of their five children, Eleanora, was born in Berlin.⁶¹ Anderson completed one tour of duty in the Foreign Service, but then financial concerns made them decide to return to the United States.⁶² He was receiving \$5093 per year, which was not enough to raise a family.⁶³

The growing Anderson family moved back to Rockford where he once again began the private practice of law.⁶⁴ As luck would have it, shortly after arrival, the incumbent State's Attorney for Winnebago County, Robert R. Canfield, decided to run for the state senate leaving an open seat.⁶⁵ Even though Anderson had not tried that many criminal cases,⁶⁶ he, with his wife's approval, decided to run for the position.⁶⁷ To his surprise, he beat out five other candidates, including a former star football player.⁶⁸

61. *Id.* at 6:20–21. Eleanora now lives abroad in Holland with her husband, who is also from Holland. *Id.* at 6:21–24. Anderson believes that the reason his daughter is now married to a European might be because she was born abroad. *Id.*

62. Anderson Transcript I, *supra* note 2, at 6:25–7:6.

63. *Id.* at 7:1–4. Anderson's assessment that his annual income was too low to sustain a growing family is quite accurate, as his 1952 income of \$5093 would become the poverty line for parents of five children by 1963. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES: WEIGHTED AVERAGE POVERTY THRESHOLDS FOR FAMILIES OF SPECIFIED SIZE 1959 TO 2006 tbl. 1, available at <http://www.census.gov/hhes/www/poverty/histpov/hstpov1.html>.

64. Anderson Transcript I, *supra* note 2, at 7:5–6.

65. See Ill. Mun. League, *Municipal Problems' Commission Meets in Rockford*, 37 ILL. MUN. REV. 149, 149 (July 1958).

66. Anderson Transcript I, *supra* note 2, at 7:9–11.

67. *Id.* at 54:6–8. Anderson describes his wife, because of her support in his past endeavors, as “a wonderful partner in whatever [he] did.” *Id.* at 54:2–3. Not only did she have no objections to Anderson's involvement in public life, but further, Anderson thinks she thoroughly approved of and enjoyed politics as much as he did. *Id.* at 54:12–15. Anderson further observes that, though she had “an independent mind of her own,” both he and his wife were “pretty much of a mind on everything from . . . gay rights to women's rights . . . and all the other . . . classic issues that sometimes couples may divide on.” *Id.* at 54:19–24.

68. Anderson Transcript I, *supra* note 2, at 7:12–16. Anderson defeated John T. “Jack” Beynon in the 1956 race for State's Attorney of Winnebago County getting 42,944 votes to Beynon's 31,017 votes. Illinois State Board of Elections, Winnebago County Election Results: 1956. Beynon had been the former star quarterback for the University of Illinois football team during the mid-1930s. Illinois Names Greatest Signal Callers in School History, May 30, 2008, <http://www.fightingillini.com/sports/m-footbl/spec-rel/053008aaa.html> (last visited Feb. 25, 2010). Earning All-American selections in 1933 and 1934, Beynon is still considered among the ten best quarterbacks in history to play for the University of Illinois football team. ALL AMERICA SELECTIONS 84 (2008), available at http://graphics.fansonly.com/photos/schools/ill/sports/m-footbl/auto_pdf/FBHist-All_AmericaSelections.pdf. At the time of the 1956 race, Beynon had been serving as the first assistant prosecutor under State's Attorney Robert R. Canfield, and because of his post and “his prowess on the football field,” was considered the favorite. Anderson Transcript II, *supra* note 3, at 9. After the upset, Anderson would go on to serve a four-year term as the new Winnebago County State's Attorney from 1956–1960. Biographical Directory, John Bayard Anderson, *supra* note 29.

Anderson “enjoyed the give and take of the courtroom,”⁶⁹ and suspects that was so because of his debate experience in high school and college.⁷⁰ However, he only served one term as the Winnebago County State’s Attorney because, unexpectedly, the longtime United States Congressman from his district announced his retirement.⁷¹

Anderson decided to enter that race.⁷² Keke encouraged him to do so, and friends in the community urged him on by forming a committee to promote his cause.⁷³ His experience of being a county official and having already been elected to office helped convince voters he was a serious candidate.⁷⁴ Again, in another field of five, he won.⁷⁵ Thus in 1961, Anderson began his twenty year career as a Congressman.⁷⁶

D. *Political Legacy in the House of Representatives*

“[Y]ou are such a tiny cog in this giant machinery that seems to move very, very slowly” is how Anderson describes his introduction to the U.S.

69. Anderson Transcript I, *supra* note 2, at 18:11–12. While serving, Anderson was able to obtain the conviction of a notorious hotel burglar, Jefferson Snow, and recalls being satisfied that Snow was “put away long enough to protect the public.” *Id.* at 18:20–19:2. Around this time, Anderson experienced great anguish over losing a murder case where the female defendant had stabbed her lover, ending his life rather abruptly. *Id.* at 19:3–7. However, in retrospect, he believes the case was decided correctly, and that her conduct, given the victim’s atrocious behavior, was probably self defense, justifying the homicide. *Id.* at 19:8–18.

70. *Id.* at 18:13–16. Anderson believes serving as the County’s State Attorney returned him back to his high school debating days, because it placed him in challenging, adversarial conflict regarding important issues. Anderson Transcript I, *supra* note 2, at 18:13–17.

71. *Id.* at 7:19–22. Representative Leo E. Allen was Anderson’s predecessor in Congress and served Illinois 13th and 16th Congressional Districts from 1933–1961. Biographical Directory of the United States Congress, Leo Elwood Allen, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000138> (last visited Feb. 25, 2010).

72. Anderson Transcript I, *supra* note 2, at 24:7–10.

73. *Id.* at 24:7–20. Anderson recalls apprehension about whether to begin a bid for Congress, as he “had merely been a candidate on a local county basis” and had not spent much time in other areas of the Congressional District. *Id.* at 24:12–17.

74. *Id.* at 24:21–23.

75. *Id.* at 8:7–9.

76. Anderson Transcript I, *supra* note 2, at 8:7–13. Anderson admits that his life was not well planned and, in fact, most of the time he “seized” the moments that fortuitously presented themselves to him. *Id.* at 20:8–10. Anderson had a good grasp on when to “seize,” as he handily defeated his Democratic opponent, Edwin M. Nelson, for the open seat with just over sixty percent of the vote. See CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 87TH CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTIONS OF NOVEMBER 8TH, 1960 11 (1961), available at http://clerk.house.gov/member_info/electionInfo/1960election.pdf. Additionally, Anderson was sworn in as a Congressman at the same time John F. Kennedy was inaugurated as President. Anderson Transcript I, *supra* note 2, at 8:9–11.

Congress.⁷⁷ “[T]he seniority system was much more sacrosanct when [he] entered Congress in that first congressional election than . . . it is today.”⁷⁸ The only way to move up the ranks was for the other Congressmen to die, retire, or run for a higher office.⁷⁹ If a Representative was unlucky enough to be there only for a term or so, they probably could never get anything done that they specifically wanted.⁸⁰ Fortunately, that was not what happened to Anderson. Voters continuously re-elected him and finally he made it on to the prestigious House Committee on Rules where he could have “a more significant role.”⁸¹

1. Fair Housing Act

Certain legislation stands out in Anderson’s mind as highlights of his career. He gives as an example the Fair Housing Act of 1968.⁸² Despite it being before the mid-point in his career, Anderson was able to be the decid-

77. *Id.* at 25:5–7.

78. *Id.* at 25:7–9.

79. *Id.* at 25:10–14. Anderson noted, in regards to the seniority system, the general malaise of being a freshman congressman as, “you just were expected to wait your turn.” *Id.*

80. See Anderson Transcript I, *supra* note 2, at 25:14–17. This statement must be couched in terms of how Anderson observed the seniority system as “a disabling and discouraging factor [to those who served briefly in Congress] in trying to get anything done.” *Id.*

81. *Id.* at 25:18–21. At the time Anderson joined the House Committee on Rules near the end of the 1960s, the Committee had become much more cooperative with the majority leadership than it had been under Chairman Howard W. Smith (D-VA), mainly because of the elevation of Rep. William “Bill” M. Colmer (D-MS) to the chairmanship following Chairman Smith’s electoral defeat in 1966. U.S. House of Representatives, Committee on Rules, 2010, http://www.rules.house.gov/110/comm_history.html (last visited Feb. 25, 2010). Chairman Smith had used the Committee on Rules to further the conservative Democratic agenda irrespective of the majority position, rather than as an arm of the majority leadership in scheduling legislation for the floor. *Id.*

82. Anderson Transcript I, *supra* note 2, at 25:21–23. The genesis of Fair Housing was in the Senate when then Senator, Walter “Fritz” Mondale, a Democrat from Minnesota, proposed Senate Resolution 1358 in August, 1967. Jane Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149 (1969). According to Ms. Dubofsky, the legislative assistant to Senator Mondale at the time, Martin Luther King’s assassination propelled the adoption of Mondale’s legislation by the House Committee on Rules which incorporated it as H.R. 1100, an amendment to H.R. 2516, better known as the Civil Rights Act of 1968. *Id.* at 160. Prior to King’s assassination and following the passage of Mondale’s legislation, the Senate had been quite concerned that the amendment would never be reported out of the House Committee on Rules. *Id.* As is momentarily discussed in the article, the Senate would soon find they had a friend in Representative John B. Anderson. See Anderson Transcript I, *supra* note 2, at 26:11–13.

ing factor in the passage of the Act.⁸³ While the Fair Housing bill was under review in the Committee on Rules, there were other members on the Committee who were opposed, both of them conservative Democrats: Chairman Bill Colmer, an “archconservative” from Mississippi, and Bernie Sisk, “a wobbly Democrat from California, who was afraid of offending his conservative . . . constituents.”⁸⁴

Their defection, caused because the bill made it illegal to discriminate against persons on account of race when a member of a minority class wanted to buy or rent a house, enabled him to cast a deciding vote for the Fair Housing Act in the Committee on Rules.⁸⁵ Minutes before the final vote was to be taken in the Committee, a motion was made to send the legislation back to a House-Senate Conference.⁸⁶ Fearing that the legislation would get too watered down if sent back to a conference committee, Anderson crossed party lines to join the Democrats in an eight to seven vote, thereby preventing this fate from occurring.⁸⁷ Thanks to Anderson’s heroics, a motion to report the bill was soon made, where it passed moments later by a vote of nine to six, commanding the legislation to reach the full membership of the House.⁸⁸

83. *Id.* at 25:23–24. Anderson, though only a Congressman for seven years in 1968, perceives his key role in the ultimate passage of the Fair Housing Act to be the highlight of his congressional career. *Id.* at 25:21–23.

84. *Id.* at 25:25–26:4 (emphasis added). Chairman Bill Colmer was actually praised in House floor speeches by other members for his efforts to “hold up” the Fair Housing legislation in the House Committee on Rules. 114 CONG. REC. 9528 (1968). Though Representative Bernie Sisk ultimately voted to report the bill out of the Committee on Rules, he had initially voted unfavorably to delay consideration of the legislation when it first appeared on the Committee docket a month earlier. 24 CONG. Q. ALMANAC 152, 165 (1968).

85. Anderson Transcript I, *supra* note 2, at 25:25–26:10.

86. Marjorie Hunter, *Rules Panel Clears Rights Bill for Vote in the House Today*, N.Y. TIMES, Apr. 10, 1968 at 1.

87. See 24 CONG. Q. ALMANAC 152, 165 (1968).

88. Hunter, *supra* note 86. The legislation containing the fair housing provisions, H.R. 1100, was reported out of the Committee on Rules with the recommendation that the full House of Representatives do so pass. H.R. REP. NO. 90-1289 (1968). “Voting to report the resolution were eight Democrats: Madden (Ind.), Bolling (Mo.), O’Neill (Mass.), Sisk (Cal.), Young (Tex.), Pepper (Fla.), Matsunaga (Haw.), Anderson (Tenn.),” and lone Republican: Anderson (Ill.). 24 CONG. Q. ALMANAC 152, 165 (1968). Those voting against reporting the resolution were Democrat and Committee Chairman William M. Colmer (Miss.), Democrat Delaney (N.Y.), “and four Republicans: Smith (Cal.), Martin (Neb.); Quillen (Tenn.), and Latta (Ohio).” *Id.* The Fair Housing provisions of the Civil Rights Act of 1968 were called up to the floor the very next day and passed by the House of Representatives by a vote of 250 to 172. 114 CONG. REC. 9620–21 (1968) (statement of Rep. Ford).

As Anderson observed, it is “not often that a single vote makes a difference.”⁸⁹ But on the Fair Housing bill, his vote did count and it got him national press coverage.⁹⁰ Naturally, this did not sit well with some in his party. Because of his vote in the Committee on Rules, the Republican conservative leadership would not recognize Anderson on the floor of the House so that he could participate in the debate.⁹¹ His Democratic friends saw what was happening and allowed him “five minutes to make the . . . best speech that [he has] ever made.”⁹²

In that speech he told a “true” story.⁹³ A young African-American man had come to Anderson while he was practicing in Rockford.⁹⁴ The man told him that he had been offered a job, but when he looked at housing and the school system he wanted to be in, there was “always a roadblock.”⁹⁵ The man told Anderson that he wanted to live in the same community that Anderson lived in, but was prevented from doing so.⁹⁶

In order for the Fair Housing legislation to be voted on by the entire Congress, it had to be voted out of the Committee on Rules.⁹⁷ After Anderson cast his ballot, the very next day it was voted on and passed.⁹⁸ Anderson got a personal phone call from President Lyndon B. Johnson who wanted to

89. Anderson, Transcript I, *supra* note 2, at 27:1–2.

90. *Id.* at 27:1–4. Indeed, Anderson’s tie-breaking vote made the front page of the *New York Times* the following morning, labeling him the “hero” of a “landmark civil rights bill.” Hunter, *supra* note 86.

91. *Id.* at 27:6–10.

92. *Id.* at 27:10–14. Anderson remembers “sitting until midnight the night before at [his] desk . . . thinking about what [he] would say.” *Id.* at 27:20–22. In his usual self-deprecating manner he opined, “I’m not suggesting that it swung that many votes, but it made me feel good.” *Id.* at 27:22–23.

93. Anderson Transcript I, *supra* note 2, at 28:24.

94. *Id.* at 29:3–4.

95. *Id.* at 29:3–9. The transcript of Anderson’s floor speech was, in pertinent part, as follows:

I am seeking to afford an advantage to and to benefit the young engineer who finally found a position commensurate with his educational abilities and then sadly confessed to me, “I am going to have to leave the community because I cannot find a place suitable for my family in which to live.”

114 CONG. REC. 9551 (1968) (Statement of Rep. John B. Anderson); *see also* 114 CONG. REC. 9557–58 (Statement of Rep. John B. Anderson) (elaborating on statement from previous cite).

96. Anderson Transcript I, *supra* note 2, at 29:9–12. Anderson admits that he might have “embellished somewhat . . . for dramatic effect,” but he believed it had a ring of truth and sincerity. *Id.* at 29:13–21. Anderson further recalls that his constituents were somewhat critical of the proposition of “fair housing,” yet he successfully convinced them to be fair minded. *Id.* at 29:24–30:4.

97. *Id.* at 26:14–16.

98. *Id.* at 26:16–23.

come down and shake Anderson's hand.⁹⁹ He did so and the President personally thanked Anderson for his work and for breaking the "logjam."¹⁰⁰

Anderson says it was one of the most useful pieces of legislation he helped pass while in Congress.¹⁰¹ He also remembers that Representative John Conyers, Jr. "came striding over from the Democratic side of the aisle and shook hands and embraced [him] and thanked [Anderson] for the help that [he] had given."¹⁰² Anderson considers Conyers as "emblematic" of the "restlessness of minorities in this country, at how slow we have been to gradually progress toward the goal of equal rights, of true equality, regardless of race and color and background and national origin."¹⁰³ According to Anderson, Conyers has fought the "good fight" for so long that he has reached a position of power within Congress; he is now the Chairman of the House Committee on the Judiciary.¹⁰⁴ Anderson observes that Conyers symbolizes somebody who just does not give up "despite the odds."¹⁰⁵ Conyers, according to Anderson, represents the "hope of the future."¹⁰⁶ It is also very possible that certain Congressmen knew that Anderson felt obligated to vote how he did because he felt that the "country was way behind on the issue of

99. Anderson Transcript I, *supra* note 2, at 26:17–19. President Lyndon B. Johnson was a fervent supporter of civil rights for African Americans both as President and as a United States Senator. See The White House, Biography of Lyndon B. Johnson, <http://www.whitehouse.gov/about/presidents/LyndonBJohnson> (last visited Feb. 26, 2010). Like Anderson, Johnson himself, while in Congress, had been instrumental in the creation and passage of the 1957 Civil Rights Act. See RANDALL B. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION 330 (2006). Later as President, Johnson would continue to tackle prejudice where it lay through the heavily supported passage of the 1964 Civil Rights Act, the Voting Rights Act of 1965, and of course, the Fair Housing Act of 1968. See *id.* at 478, 586, 840. While President Johnson did great things for the Democratic Party by engineering these anti-discriminatory bills, he became instantly unpopular in the South and in his home state of Texas. See *id.* at 330. Much like President Johnson, Anderson's role in the forward-thinking Fair Housing provisions of the 1968 Act made him initially unpopular among his constituents. Anderson Transcript I, *supra* note 2, at 29:24–30:4. Regardless, both of these great statesmen have come to be praised for their vision amidst the political retrenchment.

100. *Id.* at 26:19–20.

101. *Id.* at 30:16–18.

102. *Id.* at 27:24–28:3. Evidently, Rep. Conyers Jr. continues to remember Anderson fondly because if Anderson arrives at an event that Conyers Jr. attends, Anderson is asked to speak. See *id.* at 28:4–10.

103. Anderson Transcript I, *supra* note 2, at 171:15–20.

104. *Id.* at 171:20–23. Rep. Conyers, serving the 14th District of Michigan, has been serving in Congress since 1965, having just been reelected to his 22nd term in Congress. U.S. Congressman John Conyers, Jr., About: Biography, <http://conyers.house.gov/index.cfm?FuseAction=About.Biography> (last visited Feb. 26, 2010). He has served as Chairman on the House Committee for the Judiciary for the 110th and 111th Congresses. See *id.*

105. Anderson Transcript I, *supra* note 2, at 171:24–172:1.

106. *Id.* at 172:6–7.

civil rights and human rights.”¹⁰⁷ In his eyes, the country was “not living up to [its] Democratic heritage . . . with respect to housing and discrimination [in] employment” with regard to minorities.¹⁰⁸

Anderson had also established himself on a “solid foundation” of principles on which he intended to stand with regard to his constituents.¹⁰⁹ They were already aware of his stance on civil rights.¹¹⁰ However, Anderson knew that landlords, property owners, and the real estate business in his constituency who refused to rent, sell, or buy from minorities were not persuaded by his principles.¹¹¹ Thus, he was not surprised when a few voters made it clear they did not like which side he supported.¹¹²

2. The Gulf of Tonkin Resolution

Anderson confesses that the worst mistake he made while in Congress was to vote in favor of the Gulf of Tonkin resolution.¹¹³ This 1964 resolution was introduced when President Johnson requested that troops be sent into Southeast Asia (Vietnam) over an incident in which U.S. naval forces were attacked by the Vietnamese Navy without provocation.¹¹⁴ Actually, Johnson had already dispatched troops and was merely asking Congress to approve of his actions.¹¹⁵ They did so, and in effect, wrote Johnson a blank check allowing him to have a war without actually declaring one.¹¹⁶ Anderson, along

107. *Id.* at 104:23–105:1.

108. *Id.* at 105:1–4.

109. *See id.* at 105:5–7. Anderson posits this approach as advice to the aspiring politician. *See* Anderson Transcript I, *supra* note 2, at 103:21–22, 105:5–8. As Anderson puts it, the “solid foundation” approach means that a public servant ought to make it “crystal clear . . . that there are certain irreducible principles on which” he stands, such that there are certain programs that one can support and others that one cannot. *Id.* at 104:6–10.

110. *See id.* at 104:23–105:4.

111. *Id.* at 105:6–13. Anderson further states, however, that having a “solid foundation” allows an elected official to “more easily deal with the problems that arise when [one must] cast a controversial vote.” *Id.* at 105:6–9.

112. *See* Anderson Transcript I, *supra* note 2, at 103:8–15.

113. *Id.* at 45:8–11, 15–16. On August 7, 1964, the 88th Congress passed H.R.J. Res. 1145, known as the Southeast Asia Resolution but better known as the Gulf of Tonkin Resolution. 110 CONG. REC. 18555 (1964); Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). Later in his Presidential campaign of 1980, Anderson made a public apology for voting for the Resolution. Anderson Transcript I, *supra* note 2, at 44:16–17.

114. VIETNAM AND AMERICA: A DOCUMENTED HISTORY 248 (Marvin E. Gettleman et al. eds., 2d ed. 1995).

115. *Gulf of Tonkin Measure Voted in Haste and Confusion in 1964*, N.Y. TIMES, June 25, 1970, at 3.

116. *Id.*; VIETNAM AND AMERICA: A DOCUMENTED HISTORY, *supra* note 114, at 248. The Gulf of Tonkin resolution specifically authorized the “President, as Commander in Chief, to

with all his other colleagues in the House, unanimously voted in favor of the resolution.¹¹⁷ Later, Anderson, in his own eyes, redeemed himself by voting to cut off funds for the war.¹¹⁸ At this time in his career, he was among the Republican leadership with Gerald R. “Jerry” Ford who was the House minority leader.¹¹⁹ Ford went to Anderson and said, “John, you’re a member of the leadership and I’ve just gotten through rawhiding these freshman Republicans to vote down this resolution to cut off money for Vietnam and then you, [a] member of the leadership, vote for it.”¹²⁰ Anderson responded that he was sorry, but he had been mistaken for a long time about being at war in Vietnam, and he was not going to change his mind.¹²¹

take all measures necessary to repel any armed attack against the forces of the United States and to prevent further aggression.” 78 Stat. at 384. Thus, it is believed by some that the Gulf of Tonkin Resolution is “the closest approximation to a [Congressional] Declaration of War . . . during all the years of U.S. combat in Vietnam.” VIETNAM AND AMERICA: A DOCUMENTED HISTORY, *supra* note 114, at 248.

117. See 110 CONG. REC. 18555 (1964). The resolution passed the House by a vote of 416-to-0 and then the Senate 88-to-2 with the only negative votes cast by Senators Ernest Gruening of Alaska and Wayne Morse of Oregon. *Id.*; VIETNAM AND AMERICA: A DOCUMENTED HISTORY, *supra* note 114, at 248.

118. See Anderson Transcript I, *supra* note 2, at 45:16–17. On July 9, 1970, the House of Representatives voted on the Cooper-Church Amendment, defeating the legislation by a vote of 153-to-237, which would have effectively ended U.S. military operations in Vietnam by requiring Congressional authorization for any such action. See 116 CONG. REC. 23525 (1970). As Anderson reflected, he deeply regretted his lack of foresight in recognizing that such a resolution might accelerate the war, which it did. Anderson Transcript I, *supra* note 2, at 45:10–16. Thus, when the Cooper-Church Amendment to cut funding for the Vietnam War was introduced, though it was not adopted, Anderson voted in the affirmative. *Id.* at 45:16–17; 116 CONG. REC. 23525.

119. See Biographical Directory of the United States Congress, Gerald R. Ford, Jr., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000260> (last visited Feb. 26, 2010).

120. Anderson Transcript I, *supra* note 2, at 45:22–46:1. This is as Anderson remembers the conversation, yet his characterization of Ford appears consistent with popular opinion at the time. See *id.* at 45:17–21. As *Time* magazine published the week following the House’s rejection of Cooper-Church,

Two weeks ago, the Senate administered a mild rebuke to President Nixon when it passed the Cooper-Church Amendment cutting off funds for U.S. operations in Cambodia. The lengthy Senate debate embarrassed the Administration, and when the matter came before the House last week Republican Minority Leader Gerald Ford was determined that the embarrassment would not be repeated.

Neil MacNeil, *How Ford Put the Lid on Cooper-Church*, *TIME*, July 20, 1970, available at <http://www.time.com/time/magazine/article/0,9171,877067,00.html>.

121. Anderson Transcript I, *supra* note 2, at 46:2–4. Anderson recalls that the House minority leadership was very strong at that time, that they had a club over the heads of those in the minority and if each member went their own way the leadership would shred them completely. *Id.* at 46:10–17. Thus, there is “a lot of in-house pressure to go along” if you want to survive, and this is so particularly if a Representative is in the minority. *Id.* at 46:18–

3. Other Influences

Anderson says one of the best experiences he had while in the House was befriending Morris K. Udall, Representative from Arizona.¹²² They were best friends both on and off the floor.¹²³ Anderson credits Udall for bringing him “quite a ways down the road toward a more progressive view of the role of government than [he] had cherished up until [his] linking up with [Udall] on campaign finance [reform] and on the natural resources bills and [the] Alaska National Interest Lands bill.”¹²⁴ In Anderson’s words, this later

22. Of course, Anderson was never in the House when the Republicans had control of Congress. *Id.* at 46:22–24.

122. *See id.* at 49:11–12. Anderson honored his friend Rep. Morris K. Udall by having a fundraiser for his son, now Sen. Mark Udall (D-CO), when Mark first ran for a congressional seat in Colorado during his 1998 campaign. *See* Anderson Transcript I, *supra* note 2, at 49:14–17. Anderson felt he was paying back a debt to Morris K. Udall, who inspired him. *Id.* at 49:17–18.

123. *Id.* at 49:20–22.

124. *Id.* at 22:15–20, 49:22–50:2. Though Anderson and Udall had partnered on many natural resources bills, arguably the most influential partnership was in 1979 on House Resolution 39, better known as the Alaska National Interest Lands Conservation Act, in what would be Anderson’s final congressional term. *See Alaska National Interest Lands Conservation Act of 1979: Hearing on H.R. 39 Before the H. Comm. on Interior and Insular Affairs*, 96th Cong. (1979); 125 CONG. REC. 8107 (1979) (Mr. Udall and Mr. Anderson introduced H.R. 3636 “to provide for the designation and conservation of . . . public lands in the State of Alaska.”). According to its legislative text, it was a bill “[t]o provide for the designation and conservation of certain public lands in the State of Alaska, including the designation of units of the National Park, National Wildlife Refuge, National Forest, National Wild and Scenic Rivers, and National Wilderness Preservation Systems, and for other purposes.” Alaska National Interest Lands Conservation Act, Pub. L. No. 96–487, 94 Stat. 2371, 2371 (1980). Though Alaska preservation legislation had been repeatedly introduced since 1973 with other bill sponsors, it was heavily opposed by the Alaskan congressional delegation, particularly Alaska Senator Mike Gravel. *See* 126 CONG. REC. 21873–76 (1980); *see* H.R. 1887, 93rd Cong. (1973); *see* H.R. 1888, 93rd Cong. (1973); *see* H.R. 1893, 93rd Cong. (1973). Despite the odds, the Anderson-Udall partnership on conservation was impervious to the opposition’s attacks and the two successfully pushed the legislation through the House on May 16, 1979 with an overwhelming majority vote of 360–65. 125 CONG. REC. 11459 (1979). The legislation would then sail through the Senate by a vote of 78–14 on August 19, 1980 and then was signed into law by President Carter on December 2, 1980. 126 CONG. REC. 21891; *see* Alaska National Interest Lands Conservation Act, 94 Stat. 2371.

Anderson is such a strong supporter of public campaign financing reforms because of his beliefs regarding proportional representation. *See* Anderson Transcript I, *supra* note 2, at 100:4–6. Anderson supports providing better direct representation by having a public finance program that would financially support three or more political parties. *See id.* at 100:11–12. Anderson offers the rationale that, “in the spirit of trying to broaden the electoral base and encourage people to believe that it’s not simply big money and big money donors that are going to . . . control . . . [a] [c]ampaign, you’ve got to have that public financing.” *Id.* at 100:7–12. His experience of running for president as a third-party candidate in 1980 was that

piece of legislation “took a lot of land away from Sarah Palin’s developers . . . and put them in national parks and forest preserves in protected status where they couldn’t be developed.”¹²⁵

E. *Thoughts on Religion*

No doubt, some of Anderson’s ideas came from his up-bringing. His father was very “prominent” in the Swedish Free Church, as it was known at the time Anderson was growing up.¹²⁶ His father was the chairman and a deacon of the church.¹²⁷ As John noted, “the salvation was free, but you had to pay a little when they passed the collection plate to pay for the piping of the water of salvation.”¹²⁸ Along with other members, the children ritualistically went to Sunday school and then to morning services, which were conducted in Swedish.¹²⁹ Somewhere along the line, the services became Anglicized, and the church became the First Evangelical Free Church of Rockford.¹³⁰

As Anderson remembers the religious messages, the basic belief was in salvation, which could only be achieved through a person’s faith in Christ.¹³¹ “[T]o achieve that required a public confession [of faith], and . . . [to live] by a very strict code,” which included not attending movies.¹³² However, the

people would not contribute to his campaign because they thought it was a lost cause, hence the need for public campaign financing. *See id.* at 100:1–12. Unfortunately for Anderson, he predicts, that “in view of the success that Barack Obama had in raising money in” the most recent presidential election, that the country is going in the opposite direction of public campaign financing. *Id.* at 100:12–18.

125. Anderson Transcript I, *supra* note 2, at 22:21–24. Anderson rather comically notes that he never campaigned in Alaska in 1980 because he knew he “would be hung in effigy if [he] appeared on the scene,” given his co-sponsorship of the Alaska National Interest Lands legislation which had been vehemently opposed by Alaskan residents. *Id.* at 22:25–23:4.

126. *Id.* at 11:11–12, 17–18.

127. *Id.* at 11:12–13.

128. *Id.* at 11:19–21.

129. Anderson Transcript I, *supra* note 2, at 11:13–16. Anderson attributes this to the fact that his “church was a Swedish denomination.” *Id.* at 11:17.

130. *See id.* at 11:22–24. Anderson’s childhood church became Anglicized through a gradual process beginning in the mid-1920s. A Brief History of First Evangelical Free Church, <http://www.firstfreerockford.org/history.htm> (last visited Feb. 26, 2010). Prior to the Anglicization, not only were all services conducted in Swedish, but also all official meetings and meeting minutes were recorded in Swedish. *Id.*

131. Anderson Transcript I, *supra* note 2, at 11:25–12:1.

132. *Id.* at 12:1–7. As Anderson recalls, movies were considered “worldly pleasures,” which were pleasures his admittedly “fundamentalist” church expected its followers to eschew through strict rules of conduct. *Id.* at 12:5–7, 13–18. Thus, he remembers being “encouraged

code was not so strict as to prohibit them from listening to the radio.¹³³ Anderson remembers the radio series of “Little Orphan Annie.”¹³⁴

At the church services, however, the minister focused on words in the Bible, selecting several verses each week and expounding on them.¹³⁵ He did not incorporate any ideas from the Social Gospel movement and thus never preached a so-called social gospel.¹³⁶ It was thought doing so would lead the congregation to focus on worldly matters and, consequently, not focus on what the Bible said.¹³⁷ But, as Anderson matured, he came to believe that the teaching “lodged in [his] soul somehow differently.”¹³⁸ He believes now that he has always interpreted what was said from the pulpit differently from what the minister intended.¹³⁹ Anderson does not believe that his religious upbringing gave him the ideas that human beings should be treated equally.¹⁴⁰ It is Anderson’s belief that he came to those ideas “a little bit apart and aside from [his] religious convictions.”¹⁴¹

to find [alternative] ways of amusing [himself] other than attending the theater.” *Id.* at 12:18–20.

133. *See id.* at 13:1–5.

134. Anderson Transcript I, *supra* note 2, at 13:1–5. The radio program, “Little Orphan Annie,” was based on a comic strip by Harold Gray portraying “Annie, her dog Sandy and her pal Joe Cornassel [who were] often . . . battling gangsters, pirates and smugglers, receiving occasional assistance from business magnate Oliver ‘Daddy’ Warbucks and his sidekick Punjab.” Radio Hall of Fame, *Little Orphan Annie*, <http://www.radiohof.org/adventuredrama/littleannie.html> (last visited Feb. 26, 2010). According to the Radio Hall of Fame, *Little Orphan Annie* debuted on Chicago’s WGN in 1930 and was quickly nationally syndicated, airing until 1942. *Id.*

135. Anderson Transcript I, *supra* note 2, at 32:1–4.

136. *See id.* at 32:4–8. Thriving toward the end of the 19th and early 20th centuries, the Social Gospel movement was a new theological outlook that encouraged Christians to fuse existing Christian principles with the social problems of industrialization such that they may be avoided. *See* WALTER RAUSCHENBUSCH, A THEOLOGY FOR THE SOCIAL GOSPEL 1–2 (The Macmillan Co. 1922) (1917). This liberal theological movement challenged existing individualistic theology by showing that social problems like poverty, hunger, and war were the result of man’s collective sins, which could be avoided if Christians began to view their salvation in terms of the collective rather than individualistic. *See id.* at 5. In the words of Rauschenbusch, one of the early founders of the movement, “The social gospel is the old message of salvation, but enlarged and intensified. . . . to bring men under repentance for their collective sins and to create a more sensitive and more modern conscience.” *Id.* at 5. Thus, the so-called social gospel encourages church goers to become impassioned by worldly issues and apply their faith to halt the progress of modern social problems. *See id.* at 4–5.

137. Anderson Transcript I, *supra* note 2, at 32:6–12.

138. *Id.* at 32:19–20.

139. *Id.* at 33:3–6.

140. *Id.* at 33:6–10.

141. *Id.* at 33:15–17.

In addition to his own personal experiences, Anderson edited a book about the impact of religion in the political arena.¹⁴² In this book, Anderson personally states that religious values do make a difference on how a politician “mold[s] and shape[s] the institutions of [our] democracy.”¹⁴³ His examination of American history reveals that the founding fathers believed in separation of the church from the state and individualism.¹⁴⁴ Moreover, he explores the impact of the Social Gospel movement which led to an unfortunate division into two camps both religiously and politically.¹⁴⁵ According to Anderson, Americans tend to be either conservative or liberal, although he doubts that we have an accurate picture of what those words truly mean politically or religiously.¹⁴⁶

Anderson identifies himself as between the two religious camps, both liberal and conservative, and hence, as he analyzes it, a spiritual moderate.¹⁴⁷ Further, he says his outlook on religion impacts his outlook on politics.¹⁴⁸ While some of what he claims may seem very liberal, he exposes what he notes as a liberal trap.¹⁴⁹ For instance, he believes that people have a “basic human right to decent housing and access to food and jobs.”¹⁵⁰ Further, as he puts it, “we may not be able to legislate love between different colored children of God—but certainly civil rights ought not to be denied any man because of his race.”¹⁵¹ Naturally, those ideas are associated with a political liberal. However, as Anderson notes, what the liberals fail to understand is that “no matter how well-intentioned or how sweeping, [the laws and institutions we create] can never make human society any better collectively than it is individually.”¹⁵² Anderson’s statement exemplifies his belief that humans are fallible, and often times act sinfully.

Anderson illustrates this by considering the environment and what the Bible says about it.¹⁵³ It is true, he notes, that the Bible tells us that God

142. See generally John B. Anderson, *Forward to CONGRESS AND CONSCIENCE* (John B. Anderson, ed., J.B. Lippincott Co. 1970).

143. *Id.* at 5–6.

144. See John B. Anderson, *American Protestantism and Political Ideology*, in *CONGRESS AND CONSCIENCE* (John B. Anderson, ed., J.B. Lippincott Co. 1970) [hereinafter Anderson, *American Protestantism and Political Ideology*].

145. *Id.* at 166–67.

146. See *id.* at 176–78; see also RAUSCHENBUSCH, *supra* note 136, at 5.

147. Anderson, *American Protestantism and Political Ideology*, *supra* note 144, at 179.

148. See *id.* at 177.

149. See *id.* at 179.

150. *Id.*

151. *Id.*

152. Anderson, *American Protestantism and Political Ideology*, *supra* note 144, at 179.

153. *Id.* at 180.

created the earth for man, and to go out and “be fruitful and multiply.”¹⁵⁴ However, as Anderson points out, the Bible also says that the earth, as created, was “good.”¹⁵⁵ Thus, we have no right to despoil it, but rather an obligation to return it to its rightful state: a garden.¹⁵⁶ According to Anderson, what is desperately needed are “Christians who will begin to consider seriously each political issue on its merits in light of their religious convictions. We must stop using religion as an implicit justification for our political biases, and learn instead to give our faith new expression in our politics.”¹⁵⁷

When asked how his religion specifically influenced his legislative efforts, Anderson replied,

to put it somewhat simplistically, [religion] encourages the belief that we are all one, we are all God’s children. And I can’t conceive that the savior whom I worship would have turned someone away from his door or refused to minister to the needs of someone because of race or because of color.¹⁵⁸

F. 1980 Presidential Election: *The Brass Ring*

The most rewarding part of his career from his own perspective was the presidential campaign of 1980.¹⁵⁹ The high point of his life was being able to speak to people across America.¹⁶⁰ He made the decision to run because he found Congress to be too frustrating in that it took so long to get anything accomplished.¹⁶¹ He made this decision despite the fact that he would have likely been re-elected to the House of Representatives.¹⁶² He knew from the beginning that he had one strike against him; his only major experience was in the United States House of Representatives.¹⁶³ He started in a field of nine

154. *Id.* at 180 (quoting *Genesis* 1:28 (King James)).

155. *Id.*

156. Anderson, *American Protestantism and Political Ideology*, *supra* note 144, at 180–81.

157. *Id.* at 182.

158. Anderson Transcript I, *supra* note 2, at 31:7–21.

159. *Id.* at 38:16–19. Anderson adds however, “I’m not saying that [the presidential campaign of 1980] rewarded mankind or even my fellow countrymen,” but it was free of the conservative restrictions placed upon him as a congressman, and he thus enjoyed the experience. *Id.* at 38:17–21.

160. *Id.* at 39:7–9.

161. *Id.* at 22:11–14.

162. Anderson Transcript I, *supra* note 2, at 23:15–22.

163. *Id.* at 23:19–22.

Republicans, George H.W. Bush and Howard Baker among them.¹⁶⁴ Of course, the chief candidate was Ronald Reagan.¹⁶⁵ Anderson ran in nine primaries and left the Republican Party after the primary in Illinois.¹⁶⁶ He did well early on in the East Coast primaries, coming within 800 votes of beating Reagan in Vermont.¹⁶⁷ On the same day in Massachusetts, he beat

164. *Id.* at 8:13–25. The 1980 Presidential Republican Primary “field of nine” candidates included: Governor Ronald W. Reagan (R-CA), former CIA Director and former Representative George H.W. Bush (R-TX), Senator Howard Baker (R-TN), Representative John B. Anderson (R-IL), Former Secretary of the Treasury and former Governor John B. Connally (R-TX), Representative Philip Crane (R-IL), Senator Bob Dole (R-KS), former Minnesota Governor Harold Stassen (R-PA), and former Special Ambassador to Paraguay Benjamin Fernandez (R-CA). Our Campaigns, U.S. President–Republican Primaries Race, Feb. 17, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=51805> (last visited Feb. 26, 2010) [hereinafter Our Campaigns, Republican Primaries]. Senator Howard Baker, Jr. was then the minority leader in the Senate. Biographical Directory of the United States Congress, Howard Baker Jr., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000063> (last visited Feb. 26, 2010). According to Anderson, George H.W. Bush “was trying to resurrect his political career by running for president.” Anderson Transcript I, *supra* note 2, at 8:19–23.

165. *Id.* at 9:2–3. Anderson recalls that while the candidates were campaigning in his home state of Illinois, “Reagan claimed he was born above his father’s grocery store in White-side County, Illinois,” which was located within Anderson’s congressional district. *Id.* at 21:6–9. According to a PBS Documentary, “[a]fter the [Reagan] family settled in Dixon, Illinois, Reagan spent his summers working as a lifeguard on the Rock River and was credited with saving seventy-seven people from drowning.” The American Experience, Ronald Reagan: Program Description, <http://www.pbs.org/wgbh/amex/reagan/filmmore/description.html> (last visited Feb. 26, 2010). However, Anderson remembers thinking that Reagan “exaggerated as to how many people he’d actually pulled out” of the local Rock River and saved their lives. Anderson Transcript I, *supra* note 2, at 21:10–13. Needless to say, Anderson believed that Reagan certainly played “on his kinship with the state, even though he’d gone to Hollywood and become an actor.” *Id.* at 21:13–15.

166. *Id.* at 59:24–60:1. Although Anderson claims to have abandoned the quest for president after the March 18th primary in Illinois, he continued to perform modestly in the following three Republican primaries of Connecticut, Kansas, and Wisconsin until he left the Republican Party on April 24, 1980. *Id.* at 59:25–60:1, 21:24–22:2; Our Campaigns, Republican Primaries, *supra* note 164. Once Anderson parted ways with the GOP, he picked little-known Patrick Lucey, a former Democratic governor of Wisconsin, as his vice-presidential running mate. Anderson Transcript I, *supra* note 2, at 74:6–11. However, among Anderson’s short list had been the renowned and cherished national news anchor, Walter Cronkite. Aaron Barnhart, *News Legend Walter Cronkite, 92, Dies*, KANSAS CITY STAR, July 18, 2009, at A1. More striking are Cronkite’s quoted remarks during Anderson’s brief consideration of him as a running mate, implying his willingness to accept if Anderson had offered: “I wouldn’t turn [the offer] down.” *Id.* Given the inferably vast disparity in public notoriety between the two men, it seems more than probable that an Anderson-Cronkite campaign would have been better funded and would have received a substantially greater percentage of the national popular vote. *See id.*

167. Anderson Transcript I, *supra* note 2, at 20:14–16. Indeed, Reagan won the primary by just one percentage point or by about 690 votes over Anderson. Our Campaigns, U.S.

Reagan and came within 1100 votes of beating George H.W. Bush, who won that state.¹⁶⁸

Since it was obvious to Anderson that the GOP was going to nominate Reagan, he decided to jump ship and form a third party called the National Unity Party.¹⁶⁹ As far as Anderson was concerned, Reagan was far too conservative, and he was making the party that way too.¹⁷⁰ According to some, the National Unity Party platform was considered to have the “best written platform of any of the candidates.”¹⁷¹ However, the first major hurdle An-

President—1980 Vermont Republican Primary Race, Mar. 4, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=36160> (last visited Feb. 26, 2010).

168. Anderson Transcript I, *supra* note 2, at 20:16–18. Anderson came within one-third of a percentage point of defeating George H.W. Bush and winning the Massachusetts primary. Our Campaigns, U.S. President—1980 Massachusetts Republican Primary Race, Mar. 4, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=36158> (last visited Feb. 26, 2010). Although the elder Bush now claims Texas as his home state, according to Anderson, at the time Bush claimed Massachusetts his home state, likely lifting him to victory. Anderson Transcript I, *supra* note 2, at 20:18–21.

169. *Id.* at 42:5–14. Anderson reflected that one criticism of the new political party was that it sounded like some kind of religion. *Id.* at 42:14–16. As Anderson explained however, the philosophy behind the National Unity Party “was the idea that people ought to . . . forget about party lines for this particular election and get together and unite for the purpose of electing us.” *Id.* at 42:16–19. One of the first issues Anderson encountered on the campaign trail, prior to forming the National Unity Party, was his affirmative vote on The Gulf of Tonkin Resolution. *Id.* at 44:13–17. During the first Republican Party presidential debate in Des Moines, Iowa on January 6, 1980, Mary McGrory, a distinguished columnist from the *Washington Post*, asked Anderson what the worst mistake was that he made while in Congress. Anderson Transcript I, *supra* note 2, at 44:17–21, 45:6–9; *see also* Des Moines Register, Caucus History: The Register’s Presidential Debates, <http://www.desmoinesregister.com/article/99999999/NEWS09/71119049> (last visited Feb. 26, 2010). Anderson, true to his nature, owned up to the “yes” vote on the Resolution and, unlike many other politicians, immediately apologized. Anderson Transcript I, *supra* note 2, at 44:16–17, 45:10–16.

170. Anderson Transcript I, *supra* note 2, at 60:10–15. In Anderson’s eyes, the reason that the GOP was so conservative was that “their main support came from those bastions of conservatism in the business community, [like] the U.S. Chamber of Commerce.” *Id.* at 47:16–18. Those types of business organizations wanted government to be totally absent from the private business sector, as though the “government was simply out to get them.” *Id.* at 47:19–20. They believed that the government, by raising taxes, was stealing hard-earned money from their pockets. *Id.* at 47:20–23. However, to be fair, Anderson also noted that the Democrats suffered from a disturbing degree of corruption in the form of big city bosses, such as the Daley machine in Chicago. *Id.* at 48:14–17.

171. Anderson Transcript I, *supra* note 2, at 37:16–18. This observation was one held by David Broder, the Pulitzer Prize-winning journalist for the *Washington Post*. Biography of David S. Broder, WASH POST, <http://www.washingtonpost.com/wp-srv/opinions/biographies/david-s-broder.html> (last visited Feb. 26, 2010). Broder has worked for the *Washington Post* since 1966, and his twice-weekly column on American politics is globally syndicated. *Id.* In addition to Anderson’s platform being so highly thought of in the media, he credits his wife for being an excellent campaigner. Anderson Transcript I, *supra* note 2, at 54:9–10. “She

derson had to face was how to get on the election ballots in all fifty states.¹⁷² “[It] was a matter of really . . . grave concern,” Anderson recalled.¹⁷³ To get on the ballots meant getting people to sign petitions.¹⁷⁴ Anderson, true to form, took on part of that project himself as he remembers standing “in the hot, broiling sun out in barren spots in Oklahoma,” and asking people to sign the petitions.¹⁷⁵ In the course of campaigning, he ran into some difficulties in Ohio and finally had to sue the State to get on the ballot.¹⁷⁶ Ohio claimed that the deadline had passed, but the United States Supreme Court, with Justice John Paul Stevens writing for the five-to-four majority, held that Ohio had to let Anderson on the ballot.¹⁷⁷ The only state Anderson remembers not going to was Alaska.¹⁷⁸

could out Hillary [Clinton] as far as . . . going out and meeting folks and speaking.” *Id.* at 54:11–12; *see also id.* at 54:19–24 (Anderson elaborating on his wife’s role in his political activities).

172. Anderson Transcript I, *supra* note 2, at 60:22–61:1.

173. *Id.* at 61:1–2.

174. *Id.* at 61:3–8.

175. *Id.* As Anderson sums up the petitioning process, “going around with people with petitions, trying to get them to sign it. What a chore it was.” *Id.* at 61:7–8.

176. Anderson Transcript I, *supra* note 2, at 61:13–16. This litigation involved the Anderson campaign challenging the constitutionality of an Ohio statute which set an early filing deadline only for Independent Party candidates of seventy-five days in advance of the Ohio’s June primary election, which in 1980, was March 20. *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983). Anderson, having become an Independent candidate on April 24, after the deadline, was thus denied ballot access in November by the Ohio Secretary of State because he had not filed his statement of candidacy as an Independent prior to the March 20 deadline. *Id.* Anderson brought suit in the United States District Court for the Southern District of Ohio and was able to obtain an injunction against the Ohio Secretary of State, thereby permitting him to be listed as an Independent candidate on the November ballot. *Id.* at 783. After the November election, the United States Court of Appeals for the Sixth Circuit, upon review of the district court, found the state statute constitutional, reversing the injunction order in Ohio’s favor. *Id.* at 784. The Anderson campaign then appealed its decision to the United States Supreme Court which granted his petition for a writ of certiorari. *Id.* at 786.

177. Anderson Transcript I, *supra* note 2, at 62:2–5; *see Anderson*, 460 U.S. at 805–06. The legal issue facing the Court was whether Ohio’s statute unconstitutionally interfered with the fundamental voting and associational rights of Ohio registered voters favoring Anderson such that the Ohio early filing statute, by denying Ohio voters the right to vote for Anderson in November, was in violation of the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. *See Anderson*, 460 U.S. at 780–81. The Court sustained Anderson’s constitutional challenge to Ohio’s early filing statute, finding that it infringed on the rights of Ohio registered voters to vote for and associate with Anderson. *Id.* at 780, 792–94, 805–06. The Court opined that the statute effectively made it too burdensome for a voter to associate with or cast a vote for Anderson, for the voter would, with the statute in effect, have to go through the trouble of “writing in” Anderson’s name on the ballot to vote for him. *See id.* at 794. Thus, the interference caused by the statute was deemed

Anderson convinced David Garth, a “prominent Democratic politico” who was effectively blacklisted by the “powers that be in New York” at that time to be his professional campaign manager, likely for that reason.¹⁷⁹ Ordinarily, Garth’s up-front fees were very expensive, but by joining Anderson, he did not get paid until after the election was over.¹⁸⁰ Most of the other positions were filled by volunteers.¹⁸¹ The people who helped were there because they believed in Anderson’s platform.¹⁸² Anderson’s energy proposals and a fifty cent tax on gas, attracted lots of attention.¹⁸³ Anderson’s

unconstitutional, resulting in the reversal of the Sixth Circuit’s ruling and thereby reinstating and staying the injunction issued by the district court. *Id.* at 806.

178. Anderson Transcript I, *supra* note 2, at 22:25–23:2; *see also id.* at 22:25–23:4 (Anderson explaining why he avoided the State of Alaska).

179. *Id.* at 68:11–16. It is believed that David Garth’s presence in the campaign gave Anderson’s candidacy a substantial boost. EDWIN DIAMOND & STEPHEN BATES, *THE SPOT: THE RISE OF POLITICAL ADVERTISING ON TELEVISION* 269 (3d ed.1992). Though Garth had never run a presidential campaign, he had “a deserved reputation as the tough-talking, take-charge media man.” *Id.*

180. Anderson Transcript I, *supra* note 2, at 68:17–20. Though Anderson did not sign up Garth until May of 1980, it is perceived that Garth’s focus was largely, and wrongly, on the money. DIAMOND & BATES, *supra* note 179, at 269. Indeed, “[s]ome of Anderson’s staff, especially those displaced when Garth arrived, later publicly complained that Garth had cut himself in for a lucrative share of Anderson’s money” *Id.* However, this view of Garth’s role in the campaign is not shared by Anderson, for he was proud to have recruited the professional talent in the person of Garth. *Id.* at 270; Anderson Transcript I, *supra* note 2, at 68:24–69:1. While Anderson posits that Garth received a half million dollars, “Federal Election Commission records indicate that Garth [only received] \$229,000 in the six months he worked for the campaign.” DIAMOND & BATES, *supra* note 179, at 269–70; Anderson Transcript I, *supra* note 2, at 68:20–23.

181. Anderson Transcript I, *supra* note 2, at 69:14–15. Anderson recalls that the campaign “was essentially very much a volunteer effort. [The campaign] wasn’t run, really, except at the top by someone with professional qualifications.” *Id.* at 69:14–16.

182. *Id.* at 69:17–22. Other volunteers, Anderson remembers, joined his campaign “just for the fun of it.” *Id.* at 69:20–21.

183. *Id.* at 69:23–24, 70:2–8. During the September 21, 1980, presidential debate in Baltimore, Anderson was quoted indicating that “the price of gasoline, which [had been] \$.80 [in June of 1979,] ha[d] gone up to about \$1.30 [per gallon at the time of the debate].” Commission on Presidential Debates, *The Anderson-Reagan Presidential Debate Transcript* (Sept. 21, 1980), available at <http://www.debates.org/index.php?page=september-21-1980-debate-transcript> (last visited Feb. 24, 2010). In his opinion, and as a product of the Persian Gulf crisis, Americans needed to be encouraging conservation. *Id.* His plan was to add this fifty cent tax on gasoline and, in his words, “[r]ecycle those proceeds . . . back into the pockets of the American workers by reducing . . . their Social Security tax payments by 50%.” *Id.* Moreover, he thought that more emphasis on public transportation would have been a step in the right direction; he had plans for an inter-city rails system. Anderson Transcript I, *supra* note 2, at 143:24–144:3. Unfortunately, the opposition said such a tax would impose too much of a burden on the American people. *Id.* at 144:4–7.

positions were quite distinct from Reagan's, who was only pitching an across-the-board thirty percent tax cut.¹⁸⁴

Money was the other nagging problem.¹⁸⁵ During the campaign, both Reagan and Carter received \$29.4 million from the Presidential Election Campaign Fund, notwithstanding the tens of millions raised through individual donor contributions.¹⁸⁶ Anderson's National Unity Party was only able to raise \$14 million, and thus they were outspent more than five to one.¹⁸⁷ Fortunately, after the election, Anderson's party was eligible for funds from the Presidential Election Campaign Fund.¹⁸⁸ Even if they could not raise enough money, Anderson said he was pretty fatalistic about it, and his campaign spent the money as it came in.¹⁸⁹ The lack of funds caught Anderson's new party somewhat off guard because, in the final weeks of the election, they could not execute the massive advertising they desired; Anderson thinks that this certainly made a difference on the outcome.¹⁹⁰

On the campaign trail, Anderson was in his element. He liked meeting the people and expounding on his ideas.¹⁹¹ He admits that the "appreciation

184. *Id.* at 70:9–11. According to Anderson, the thirty percent tax cut "was [Reagan's] prime plank in his 1980 platform." *Id.* at 70:11–12. On the other hand, Anderson "wanted to [simply] limit the tax cut to the poorest of the poor . . . and forget about the fat cats." *Id.* at 70:12–14.

185. Anderson Transcript I, *supra* note 2, at 62:20–21.

186. L. PATRICK DEVLIN, *Campaign Commercials*, in TELEVISION IN SOCIETY 17, 17 (Arthur Asa Berger ed., 1987); see Anderson Transcript I, *supra* note 2, at 62:22–24.

187. Anderson Transcript I, *supra* note 2, at 62:11–12, 62:24–63:1. Records indicated that Reagan spent eighteen million or sixty percent of his federal funds on advertising alone. DEVLIN, *supra* note 186, at 17. Given that Anderson would have to wait until after the election to determine whether he would be eligible for federal funds, his total campaign revenues of fourteen million—which of course had to go to every facet of the campaign—were thus vastly insufficient to rival the media presence which Reagan's campaign could afford. Anderson Transcript I, *supra* note 2, at 62:11–19.

188. *Id.* at 62:14–16. Anderson implies that several million dollars had to be borrowed, inferredly due to a lack of campaign contributions. *Id.* at 62:16–19. After the election, because Anderson received more than five percent of the national popular vote—he actually received 6.65%—he was entitled to just over four million dollars from the Presidential Election Campaign Fund. *Id.* at 62:16–19; Roper Center at the University of Connecticut, U.S. Presidential Elections 1980, http://www.ropercenter.uconn.edu/elections/presidential/presidential_election_1980.html (last visited Feb. 24, 2010). According to Anderson, it was this eligibility which enabled him to repay his loans and other related debts that had been acquired during the campaign. Anderson Transcript I, *supra* note 2, at 62:16–19.

189. *Id.* at 63:4–7.

190. *Id.* at 63:10–12.

191. *Id.* at 39:22–24. Reflecting on the experience, Anderson recalls that he "could go out in that campaign and crisscross the country and talk to very good-sized audiences in public squares." *Id.* at 39:1–3. On one very sentimental occasion, Anderson told of his joy about a

and the adulation” would flatter anyone.¹⁹² It was not “just the smell of the grease paint and the roar of the crowd, but there’s a little bit of that in all of us,” but rather the ability to reach so many Americans directly that kept him vitalized.¹⁹³ He got most of his support in the more “liberal” part of the country, such as the northeast, and somewhat in California.¹⁹⁴ He wished that he had gained more support from the conservatives, but, as he put it, “you take your support where you can find it.”¹⁹⁵

1. Sample “Outsider” Speech: African Americans

Anderson’s campaign speeches embody his concern for “outsiders.” For instance, in a September 1980 speech given at the Memorial United Church, a largely African American congregation in Oakland, California, he started out with a quote from the prophet Micah who said, “[a]nd what does the Lord require of you, but to act justly, to love mercy, and to walk humbly with your God.”¹⁹⁶ He calls on everyone to act justly and respect every person because no man “or woman stands higher than any other.”¹⁹⁷

Anderson acknowledged that “lasting and well-paying jobs” are of great concern for Black Americans.¹⁹⁸ He said that they “make the difference between security and fear, between opportunity and closed doors, between

journey from San Jose to San Francisco on the back end of a railroad car which was destined for a huge rally. Anderson Transcript I, *supra* note 2, at 39:3–6.

192. *Id.* at 39:21–25.

193. *Id.* at 39:25–40:3.

194. *Id.* at 40:21–25. Anderson fondly remembers meeting with Barbra Streisand during the campaign at her home in Beverly Hills. *Id.* at 41:1–2. “You know, you don’t forget about that right away,” Anderson remarked. Anderson Transcript I, *supra* note 2, at 41:2–3. According to Anderson, there was “a very ambitious plan” to have Streisand perform in a series of concerts and have the proceeds funneled into his campaign. *Id.* at 41:4–7. Though “she never quite signed on the dotted line,” Anderson received very generous support from one Norman Lear. *Id.* at 41:8–12. At the time, Lear was a movie producer and Anderson recollects that Lear contributed a couple hundred thousand dollars toward advertising for the campaign. *Id.* at 41:15–18.

195. *Id.* at 42:22–43:3.

196. Remarks by John B. Anderson to the Memorial United Methodist Church of Oakland, California 1 (Sept. 14, 1980) (transcript available at Nova Law Review) [hereinafter Remarks]; Micah 6:8. In much the same way that Anderson spoke this phrase to his followers, the Jewish prophet Micah would have first orated these immortal words to the people of his day over 2700 years ago. See *id.*

197. Remarks, *supra* note 196, at 1. This approach is consistent with Anderson’s feelings on race, as he believed that no race stood any higher than another. See Anderson Transcript I, *supra* note 2, at 31:15–21.

198. Remarks, *supra* note 196, at 1.

hope and despair.”¹⁹⁹ Anderson recognized that people want respect, bread and justice.²⁰⁰ “Above all, it means that we should strive unceasingly for a society in which all enjoy genuinely equal opportunity to develop their gifts and to go as far as their talents and energies will allow.”²⁰¹

2. Sample “Outsider Speech”: Women’s Rights

In a speech before 1000 potential voters,²⁰² Anderson explicitly praised the women’s movement for publically addressing rape, incest and wife abuse among other issues.²⁰³ He noted that research frequently focuses on men and ignores the particular needs of women.²⁰⁴ His bravery was demonstrated when he talked about teen pregnancy and access to birth control.²⁰⁵ Anderson acknowledged that rape was under reported and the legal system failed to correct the problem.²⁰⁶ His words must have shocked many. For instance, the following quote regarding the Equal Rights Amendment is not something the general public usually heard, especially from male politicians:

The resistance to freeing women from the legal shackles, which is just a beginning, is very strong and to a large extent emotionally based. I am afraid that too many state legislators share John Adam’s sentiments expressed in his response to Abigail’s plea to “remember the ladies” in the Constitution. John [Adams] replied, “depend upon it, we know better than to repeal our masculine systems.”²⁰⁷

199. *Id.* Anderson ultimately attributes the concern over livelihood to the failure of public education in a modern economy. *Id.* Noting that to hold a job, or even be trained for one, requires basic reading and writing skills, Anderson propounds the education system’s failure to impart such training is an “absolute disgrace.” *Id.*

200. *Id.* at 3. Hoping to strike a chord with the minority crowd, Anderson explicated that justice means “the even-handed application of our laws,” such that housing opportunities on the basis of race are equal, such that application of taxes are equal, and such that the affliction of unemployment is equal. Remarks, *supra* note 196, at 3.

201. *Id.* Anderson explains this measure as “the kind of justice the Preamble of our Constitution commands us to establish.” *Id.*

202. John B. Anderson, Women in Crisis 1–2 (June 6, 1980) (transcript available in the Nova Law School Library and Technology Center) [hereinafter Anderson, Women in Crisis].

203. *Id.* at 2.

204. *Id.* at 3.

205. *See id.* at 3–4. Anderson exposes the human tragedy “that two million sexually active teenagers have no access to birth control.” *Id.* at 3.

206. Anderson, Women in Crisis, *supra* note 202, at 4.

207. *Id.* at 6.

As can be expected, Anderson was an early front-and-center supporter of the Equal Rights Amendment.²⁰⁸ He gave a lot of credit to his wife, Keke, and his daughters.²⁰⁹ But, in his own words, he said that he “felt that women need to be more adequately represented both in elected office and in appointed positions, and that they had an important role to play in government.”²¹⁰ Similar to other stands he took as a congressman, being a supporter of the Equal Rights Amendment was controversial.²¹¹ There were those who opposed amending the Constitution to accomplish the goal.²¹² The conservatives believed the Constitution was a “sacred document and that you ought to think not once, but twice, and [Anderson did not] know how many more times than that, before you change the language and add to it.”²¹³ Anderson believed that perhaps those who were against the ERA thought “women were overreaching in asking for that kind of constitutional protection.”²¹⁴ Regardless, Anderson believed that an amendment was proper, and he voted to extend the amount of time it took each state to ratify the Amendment.²¹⁵

208. Anderson Transcript I, *supra* note 2, at 55:11–16. In 1972, the 92nd Congress passed House Joint Resolution 208, better known as the Equal Rights Amendment, which, pursuant to Article V of the Constitution, required ratification by three-fourths of the state legislatures—thirty-eight states—to become an amendment to the United States Constitution. Proposed Amendment to the Constitution of the United States, H.R.J. RES. 208, 92d Cong. 2d Sess., 86 Stat. 1523 (1972); 117 CONG. REC. 35815 (1971); 118 CONG. REC. 9598 (1972). As passed by Congress, the Equal Rights Amendment prescribed a seven-year state ratification period, which if not met, would cause the Amendment to fail. *See State v. Freeman*, 529 F. Supp. 1107, 1114 (D. Idaho 1981) (mem.), *vacated*, 459 U.S. 809. By 1978, one year before the ratification deadline, thirty-five of the required thirty-eight states had ratified the Amendment. Allison L. Held, Sheryl L. Herndon, & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 117 (1997). Worried that the Amendment may fail, Representative Elizabeth Holtzman of New York introduced House Joint Resolution 638 to grant states a three-year extension to ratify the Amendment, which received only a simple majority, not the two-thirds supermajority that was required to extend the ratification period. *See* H.R.J. RES. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978); 124 CONG. REC. 26264–65 (1978); 124 CONG. REC. 34092 (1978). Anderson says that although he “fought very hard” for the Equal Rights Amendment, not enough other members would vote for House Joint Resolution 638 to achieve the two-thirds majority, ultimately causing the Amendment to fail. Anderson Transcript I, *supra* note 2, at 55:11–14.

209. *See id.* at 135:18–22.

210. *Id.* at 135:25–136:3.

211. *See id.* at 136:4–11.

212. *See id.* at 136:18–23.

213. Anderson Transcript I, *supra* note 2, at 136:18–23.

214. *Id.* at 136:24–137:4.

215. *See id.* at 136:12–16. On August 15, 1978, the measure to extend the ratifying period for the Equal Rights Amendment passed the House, with Anderson casting one of the 233 Yeas to 189 Nays. 124 CONG. REC. 26264–65 (1978).

His remarks before another crowd of women were also remarkably outsider-sensitive. He said he was proud of the fact that twenty-one of his state coordinators were women.²¹⁶ He said he supported the women's movement during the 1970s because it was "a vital force in our society" despite the great opposition.²¹⁷ He told the crowd about all the particular laws that treat women in a disparaging manner.²¹⁸ For instance, Anderson said that it was a national disgrace that approximately 3.5 million women were beaten by their husbands each year, and further, that women were only receiving fifty-nine percent of what men earned.²¹⁹

What would Anderson have done differently for women if he had become President? He listed ratification of the ERA as a top priority, followed by freedom of choice and making sure that poor women are able to get funding for abortions, among other things.²²⁰ Anderson wanted to have women

216. John B. Anderson, Address in Portland, Oregon: Justice for American Women 1 (Sept. 15, 1980) (transcript available at Nova Law Review) [hereinafter Anderson, Justice for American Women Address]. Anderson additionally cites the great gains of the women's movement to include, most notably, the passage of anti-discriminatory legislation in employment on the basis of gender, the freedom of the right to choose, improvements in laws affecting marital property and divorce, the building of shelters for victims of domestic violence, and the increased role of women in politics. *Id.* at 1–2.

217. See *id.* at 1. Importantly, Anderson stressed to the crowd that "[i]n spite of the impressive victories already won, women are far from achieving full partnership in any of our institutions, including the family." *Id.* at 2. Thus, Anderson urged the continued stride toward additional progress in the areas of women's rights. See *id.* at 6.

218. See Anderson, Justice for American Women Address, *supra* note 216, at 2–4. For instance, the State of Georgia had a law on its books—and still does—which commands that the "husband is the head of the family and the wife is subject to him," notwithstanding other statutory enactments. *Id.* at 2; GA. CODE ANN. § 19-3-8 & cmt. ed. note (2004), *invalidated in part by Jones v. Jones*, 376 S.E.2d 674, 676 (Ga. 1989). More staggering is Georgia's binding legal precedent that

the husband is head of the family, and . . . has the right to fix the matrimonial residence without the consent of the wife; [who] is bound to follow her husband, when he changes his residence, [if] the change is made by him in good faith, and not from whim or caprice, or as mere punishment of the wife, or to a place where he did not intend to reside, or to a place where her health or comfort will be endangered.

Carver v. Carver, 34 S.E.2d 509, 510–11 (Ga. 1945) (quoting *Pace v. Pace*, 115 S.E. 65, 65 (Ga. 1922)).

219. Anderson, Justice for American Women Address, *supra* note 216, at 3. Additionally, Anderson cites the disheartening truth in the field of domestic relations noting that "[t]hree quarters of the divorced women are supporting their children," and only 4.6% of these women received alimony. *Id.*

220. *Id.* at 4–5. Anderson observed that when the conservatives had said the Equal Rights Amendment would destroy marriage because it would cause women to leave the homemaking role, it was most certainly a "dreary view of marriage." *Id.* at 6. Thus, Anderson was exactly the political opposite of what Reagan proposed. *Id.* at 5. Reagan was against the Equal Rights Amendment, was against the right to choose an abortion, and certainly did not believe

treated as equals.²²¹ While he opposed the draft, he thought that if men were going to be drafted, women should also be subject to the draft.²²²

3. Sample “Outsider” Speech: Native Americans

In Anderson’s address before the Council of Energy Resource Tribes, a group of Native Americans, he assured them that he would see to it “that the federal government scrupulously [met] all its obligations under existing treaties, executive orders, and judicial decisions.”²²³ He wanted to make sure that the tribal voices at the Bureau of Indian Affairs were heard and promised to address the special concerns regarding education and health.²²⁴ His main focus was on the intelligent utilization of energy—largely coal, uranium, and natural gas—by the Native American community.²²⁵ Anderson said he would make sure that neither the government nor private industry would “exploit [the community] in a manner detrimental to [its] interests.”²²⁶ In addition, he promised that he would support and sign the “Tribal Governmental Tax Status Act, which [would] allow tribes to issue tax free bonds which [could] aid in funding their energy development.”²²⁷ Anderson promised that there would not be a “Camp David” energy conference without tribal presence.²²⁸

in using government funds to help poor women obtain abortion services. Anderson, Justice for American Women Address, *supra* note 216, at 5.

221. See Anderson Transcript I, *supra* note 2, at 55:11–16; Anderson, Women in Crisis, *supra* note 202, at 6–8.

222. Anderson, Justice for American Women Address, *supra* note 216, at 5.

223. Congressman John B. Anderson, Address to the Council of Energy Resource Tribes 1 (Sept. 5, 1980) (transcript available at Nova Law Review) [hereinafter Anderson, Address to the Council of Energy Resource Tribes].

224. See *id.* Specifically, Anderson promised that he would “press for the timely completion of the [Bureau of Indian Affairs] federal recognition project.” *Id.* Anderson further articulated, as a solution to the specialized concerns of the Native American community, that he would push for “adequate funding for Indian controlled community colleges and bilingual education, as mandated by law.” *Id.*

225. *Id.* at 2. Anderson offered that the Native American community’s “greatest hope for economic development lies in the intelligent use of the” natural resources it controls. Anderson, Address to the Council of Energy Resource Tribes, *supra* note 223, at 2.

226. *Id.*

227. *Id.*

228. *Id.* at 3. In early July 1979, President Jimmy Carter held a “domestic summit” for ten days at Camp David, to discuss, in the words of Rosalynn Carter, “how [the] nation could rally to resolve the oil crisis and renew [the People’s] confidence in the social, political, and economic future of the country.” ROSALYNN CARTER, FIRST LADY FROM PLAINS 325–26 (1984). The domestic summit generated intense interest—given the already long lines at the gas pump—as the President brought groups of “governors, labor and business leaders, mem-

4. The One Debate

The fact that Anderson was not invited to be part of the debates dealt a final blow to his campaign.²²⁹ Anderson was only able to participate in one national debate that was held in Baltimore.²³⁰ While the debate coaches all thought Anderson had won, evidently the people did not quite agree.²³¹ Carter, who was the Democratic nominee, would not even appear on the same debate with Anderson and Reagan.²³² Carter's excuse was that "he would be debating two Republicans."²³³ Being "shut out of the final debate" was the

bers of Congress, local officials, oil industry executives, economists, energy experts, even religious leaders and philosophers." *Id.* at 326. As inferred by Anderson's remarks, Native Americans were left without representation at this national round table discussion on energy. See Anderson Address to the Council of Energy Resource Tribes, *supra* note 223, at 3.

229. See Anderson Transcript I, *supra* note 2, at 63:13–14, 64:2–8.

230. *Id.* at 63:14–15. The first of two presidential debates that would be held in 1980 was on September 21 in Baltimore, Maryland. The Anderson-Reagan Debate Transcript, *supra* note 183. Though the debate was sponsored by the League of Women Voters Education Fund, only Ronald Reagan and Anderson would spar that evening. *Id.* Throughout the debate, Anderson spoke much about the progression of women's rights and distanced himself from Reagan and Carter by taking positions that were diametrically opposite to the main two parties' platforms. Anderson Transcript I, *supra* note 2, at 91:20–92:5; Interview with John Anderson (Sept. 13, 1999), available at <http://www.pbs.org/newshour/debatingourdestiny/interviews/anderson.html>.

231. Anderson Transcript I, *supra* note 2, at 63:15–17. After the debate, a poll was taken among high school and college debate coaches to determine whether Reagan or Anderson would have won the debate had the debate been judged on a point system; it was agreed that Anderson had the advantage. Interview with John Anderson, *supra* note 230.

232. See Anderson Transcript I, *supra* note 2, at 63:17–18.

233. *Id.* at 63:18–19. In a 1999 interview with Jim Lehrer, when asked about the impression left by President Carter's absence from the debate, Anderson responded that "Carter was being very defensive, felt beleaguered and was unwilling to expose himself to a three person debate." Interview with John Anderson, *supra* note 230. Anderson further proffered on Carter's motives saying,

I think [Carter] feared that [his appearance at the debate] would legitimize my campaign to an even greater extent. . . . I think it was purely defensive politics that he was playing that made him refuse to get on the stage with both Reagan and . . . his excuse was, of course, well, they are two Republicans.

Id. But to Anderson, this could not have been further from the truth. *Id.* In his own words, Anderson stated, "I had left the Republican party. I had taken diametrically opposed positions to Reagan on National Security issues, on the energy problem, [and] on his tax policy. . . . [Thus], there couldn't have been two people on the stage that differed more widely than did Ronald Reagan and I." *Id.* President Carter himself, in a 1989 interview with Jim Lehrer, even indicated that the reason Reagan wanted Anderson in the debate with himself and Carter was because "Reagan knew that every time [Anderson] got a vote, it was a vote taken away from me." Interview with President Jimmy Carter (Apr. 28, 1989), available at <http://www.pbs.org/newshour/debatingourdestiny/interviews/carter.html>. Anderson also be-

most damaging of all.²³⁴ It “took place just about ten days before the election.”²³⁵ Anderson believes that by not being allowed to participate in the debate, instead of getting about fifteen or twenty percent of the vote, he got 6.63%.²³⁶ Also, getting a higher percentage of votes likely would have paved the way for a viable future third party.²³⁷

believes that Carter saw him as a real threat especially for the black vote, which was normally Democratic. Anderson Transcript I, *supra* note 2, at 121:21–25.

234. Anderson Transcript I, *supra* note 2, at 64:2–8.

235. *Id.* at 64:3–4; Commission on Presidential Debates, The Carter-Reagan Debate Transcript (Oct. 28, 1980), available at <http://www.debates.org/index.php?page=october-28-1980-debate-transcript> [hereinafter The Carter-Reagan Debate Transcript].

236. Anderson Transcript I, *supra* note 2, at 64:4–8. On November 4, 1980, when all was said and done on election day, Anderson garnered 5,720,060 votes nationally, or 6.61% of the popular vote. Our Campaigns, U.S. President Nat’l Vote Nov. 4, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=1937> (last visited Feb. 25, 2010). Anderson’s best regional performance was in the New England states, where Anderson consistently received upwards of ten percent of the popular vote. *See id.* Anderson ultimately had the greatest concentration of supporters in Massachusetts as he received 15.15% of the total vote cast within the state. Our Campaigns, U.S. President–1980 Massachusetts U.S. President Nat’l Vote, Nov. 4, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=2288> (last visited Feb. 25, 2010). The State of Hawaii also turned out favorably for Anderson, where he received 10.56% of the total vote. Our Campaigns, U.S. President–1980 Hawaii U.S. President Nat’l Vote, Nov. 4, 1980, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=2278> (last visited Feb. 25, 2010). Although Anderson has never claimed that he would have won the election, his inference of higher vote totals appears quite logical had he appeared eight days earlier on national television for the final presidential debate. *See* Anderson Transcript I, *supra* note 2, at 64:5–8.

237. *Id.* at 64:9–11. Indeed, Anderson is a great proponent of Proportional Representation. *See id.* at 100:4–12. Since his departure from public office, Anderson has focused his energy on trying to create an electoral system where multiple political parties can thrive. *See* John B. Anderson & Jeffrey L. Freeman, *Taking the First Steps Towards a Multiparty System in the United States*, FLETCHER F. WORLD AFF. Winter/Spring 1997, at 73, 73–74 (1997). Anderson supports a piece of state-based legislation called the National Popular Vote bill that would “guarantee the Presidency to the candidate who receives the most popular votes.” Letter from Barry Fadem, et al., National Popular Vote, Agreement Among the States to Elect the President by National Popular Vote to the Public I (Apr. 29, 2009), available at <http://nationalpopularvote.com/resources/8-Page-NPV-Memo-V65-B-2009-4-29.pdf>. By so enacting the National Popular Vote bill, third party candidates would become much more viable as the opportunity to be elected would increase dramatically. *See* Anderson & Freeman, *supra*, at 80. In addition, “difficulties encountered by third-party candidates, including such basic issues as ballot access, participation in the presidential debates and attracting media attention,” would all but disappear if, in fact, every vote counted. *See id.* at 73. Anderson posits “two methods by which a multiparty system can begin to take root in the United States.” *Id.* His first suggestion is coalition building; the notion that the energy of pluralistic viewpoints must be harnessed prior to a presidential campaign, not because of one. *See id.* at 73–74, 80–81. Secondly, he suggests the possibility of multiparty politics through a fusion ticket; a ticket “in which a candidate can appear on the ballot under the banner of more than one party,” and thereby garnish more votes through inherently broader voter appeal. *Id.* at 74,

G. *From His Own Perspective on Being a Supporter for Outsiders*

When asked directly why he is a supporter of “outsider’s rights,” Anderson observes that, despite his conservative upbringing, both religiously and politically, his life experience steers him to support those who do not have the advantages he had.²³⁸ He notes that he has had the advantage of broad and extensive contacts with people of all walks of life.²³⁹ Anderson “treasure[s] [the] open mindedness and the willingness to accept new ways, new ideas, as being the road that we ought to travel.”²⁴⁰ It makes him smile when he thinks about his roots and he now finds the liberal views far more congenial.²⁴¹ When asked where his inner strength comes from, Anderson’s focus derives from the fact that a great many challenges are still out there.²⁴²

81. Anderson further solidifies his position as a great proponent of Proportional Representation through his chairmanship of the nonprofit organization, FairVote, The Center for Voting and Democracy. Anderson Transcript I, *supra* note 2, at 65:25–66:1. Taken directly from the FairVote website, its claimed purpose is to “act[] to transform our elections to achieve universal access to participation, a full spectrum of meaningful ballot choices and majority rule with fair representation for all.” FairVote, <http://www.fairvote.org> (last visited Feb. 25, 2010). Through Anderson’s leadership at FairVote, the organization has endorsed the state-based National Popular Vote bill, which now has been enacted by Hawaii, Illinois, New Jersey, Maryland, and Washington. Letter from Barry Fadem, et al., *supra*, at 1. Additionally, FairVote has championed efforts to push run-off voting and other election reforms. Anderson Transcript I, *supra* note 2, at 66:1–2. Anderson truly believes that until the nation’s people reform the electoral process, all elections will remain exclusive contests between the two major political parties. *Id.* at 66:3–4.

238. *Id.* at 55:17–56:10, 56:16–19.

239. *Id.* at 56:16–21. Indeed the gamut has been run, from Anderson’s African-American congressional constituent who, prior to the Fair Housing legislation, was being held back by discriminatory housing laws to the Prince of Sweden. *Id.* at 34:4–11. While Anderson was in Congress, Prince Bertil of Sweden made a visit to Rockford, Illinois as part of a celebration of the tricentennial anniversary of Swedish settlement of North America. Anderson Transcript I, *supra* note 2, at 34:6–11. While the Prince was in town, Anderson arranged for the Prince to visit his “father’s humble little bungalow.” *Id.* at 34:13–17. According to Anderson, as the Prince entered the living room, “[his] father sat there beaming, [and] shook hands with—he could hardly believe it himself—the crown prince of Sweden.” *Id.* at 34:17–20.

240. *Id.* at 56:21–24.

241. *Id.* at 57:3–10. As Anderson notes the irony of his current political views, now he looks “for the most liberal candidate for whom [he] can vote rather than the most conservative.” Anderson Transcript I, *supra* note 2, at 56:11–13.

242. *Id.* at 151:20–152:1. Anderson admits to some feelings of “despondency and not quite deep despair, but . . . discouragement,” which he perceives is a product of having labored so long over similar challenges. *Id.* at 151:10–19. Generally, Anderson cites the continued need for reforms in “our own electoral system, our . . . domestic politics, and in the international realm.” *Id.* at 151:12–16. Yet specifically, he notes that the World Federalist Association, which is dedicated to supporting a global system of democratic governments that are accountable to its citizens, has been around for a number of years with very few of its

As long as Anderson sees some progress, it is enough to provide a spark to keep going.²⁴³

III. THE PERSPECTIVE OF OTHER INSIDERS: SENATOR GEORGE MCGOVERN

A. *Reflections*

While it is often stated that politics make for strange bedfellows, that would seem, on its face, to hold true for John Anderson, the Rockefeller Republican-turned-Independent and George McGovern, the liberal-leaning Democrat;²⁴⁴ however, the analogy, as with many labels, is deceiving. Though each has championed a career under the guise of competing labels, representing their respective parties, both Anderson and McGovern, more often than not, were on the same side of an issue, crafting careers as reformers and often challenging the status quo. They share the rare experience of running as candidates for President of the United States, while similarly hav-

ultimate goals realized. *Id.* at 151:16–19. The most evident example of its failure, logically, can be seen in the fact that many world governments, even those within Europe, still are not democracies and are thus not accountable to their citizens. *See* Global Solutions, The World Federalist Institute, <http://www.globalsolutions.org/wfi> (last visited Feb. 25, 2010).

243. Anderson Transcript I, *supra* note 2, at 152:12–15. To propound his thoughts, Anderson uses the example of women in government to illustrate how the progress in that area provides his inspiration to continue fighting. *See id.* 152:16–17. As Anderson points out, for a long period of time the only woman in the United States Senate was Margaret Chase Smith. *Id.* at 152:17–19. Now, he says, “I think we have at least 16 members of the Senate . . . who are women. . . .” *Id.* at 152:20–21. Moreover, Anderson cites to the fantastic governorships held by women, particularly Kathleen Sebelius, the United States Secretary of Health and Human Services, and former governor of Kansas, and Jennifer Granholm, the governor of Michigan. *Id.* at 152:22–153:7. Further, Anderson recognizes the epitomic mark of progress of having Diane Feinstein as a leader in the United States Senate, Nancy Pelosi as the Speaker of the House of Representatives, and Hillary Clinton as the most viable woman candidate to run for president. Anderson Transcript I, *supra* note 2, at 153:9–12, 16–17. While Anderson admits that he supported Clinton’s opponent for the Democratic nomination, now President Barack Obama, he offers that he “could not but admire the valiant struggle that [Hillary Clinton] made. And [he] think[s] she made a real contribution in her campaign to remind us that . . . we will see a woman President of the United States, and we’ll wonder why did it ever take as long as it did.” *Id.* at 153:17–24. Thus, it is heart-warming examples of progress, like the area of women in politics that instill hope and propel people like John B. Anderson to continue the good fight. *See id.* at 152:15–154:2.

244. Both of McGovern’s parents “were conservative Republicans till the day they die[d].” Transcript of George McGovern, at 12:10–11 (2009), (*on file* with Nova Law Review) [hereinafter McGovern Transcript].

ing shared the prominence of very public defeats.²⁴⁵ Yet seemingly, as if the most natural progression in the world, both Anderson and McGovern went on to champion some of their most heartfelt issues following their presidential bids, using their credibility capital to springboard reforms in voting and global humanitarian reform.

George McGovern and John Anderson first met while both were serving in the U.S. House of Representatives.²⁴⁶ Reflecting upon their early days in the House together, McGovern stated that he admired Anderson from, “the first time [he] met him.”²⁴⁷ McGovern viewed Anderson in a way that would become even more apparent when Anderson later became a practicing law professor: scholarly.²⁴⁸ McGovern also described Anderson as a person of “obvious personal character, integrity [and] self-confidence.”²⁴⁹ It was McGovern’s impression of John Anderson, early on, that Anderson engendered respect from his listeners when he spoke on the floor of the House of Representatives, having an innate confidence which bespoke of thoughts carefully devised and not improvised.²⁵⁰

When asked whether their similar backgrounds²⁵¹ helped them form a closer bond as both colleagues and friends, McGovern indicated affirmatively.²⁵² McGovern remarked that he thought Anderson shared or, at a minimum, had similar views on war, having had firsthand experience.²⁵³ McGovern reflected that, “we came home with a healthy appreciation for how bloody war [could] be, especially modern war.”²⁵⁴ McGovern suspects that

245. McGovern stated that he “talked to [Anderson] several times after the campaign. He didn’t seem to be demoralized. He was glad he tried and he made a lot of new friends across the country.” *Id.* at 25:1–4.

246. *Id.* at 1:19.

247. *Id.* at 1:20–21. McGovern stated, “One thing, it may seem a little superficial, I admired the way he carried himself, absolutely straight up, no nonsense.” *Id.* at 1:21–23.

248. McGovern Transcript, *supra* note 244, at 1:24.

249. *Id.* at 1:24–25.

250. *See id.* at 2:1–7.

251. Similar, in that both were from the Midwest and both served in World War II. *Id.* at 2:16–17.

252. *Id.* at 2:19–20. McGovern was a bomber pilot during the war and, “came home with a desire to make whatever contribution [he] could to the cause of peace.” McGovern Transcript, *supra* note 244, at 2:25–3:3.

253. *Id.* at 3:9–11. According to McGovern, “he had learned enough about war from firsthand experience so that he realized it was more than just a glamour trip. That we had to be careful about where we committed young Americans.” *Id.* at 3:10–14.

254. *Id.* at 4:2–3. He came to appreciate that fighting in a war did not make him or Anderson pacifists, but merely appreciative of the bloodshed and complexities of war. *See id.* at 4:1–3. According to McGovern, “I’m proud of my service in World War II. It’s the last war I believed in.” McGovern Transcript, *supra* note 244, at 3:4–5.

Anderson is also “cautious about [sending] young Americans to combat.”²⁵⁵ When asked about McGovern’s vote for the Gulf of Tonkin Resolution—which Anderson reflectively and soberly stated was one of his greatest mistakes²⁵⁶—he echoed a similar sentiment in that he also “regret[ted] that vote more than any other.”²⁵⁷ McGovern recalls speaking with Anderson about the Vietnam War and, on occasion, would ask Anderson what he thought about a particular issue.²⁵⁸ Once McGovern moved into the Senate, with Anderson remaining in the House of Representatives, their concentric circles shifted, and they had less contact with one another, politically.²⁵⁹

B. *Courageousness of the Third-Party Candidacy*

“I was always skeptical of an independent run,” remarked McGovern when discussing Anderson’s break with his party and choice to run for President as a third-party candidate.²⁶⁰ He summarized, “[t]he problem with running as an independent is that we’ve never elected one.”²⁶¹ McGovern approaches the idea of running outside the two-party system as a pragmatist—seeing what is, while Anderson, though firmly grounded, approaches the presidency in a theoretical fashion—seeing what could be. McGovern noted the obstacles to electing a viable third-party candidate, such as the possibility of shifting moderate and liberal independent votes away from the Democrats which, “might ensure the election of a Republican.”²⁶² McGovern felt that

255. *Id.* at 3:15–18.

256. Anderson Transcript I, *supra* note 2, at 45:8–11.

257. McGovern Transcript, *supra* note 244, at 6:17–18. McGovern spoke candidly, with the disappointment still evident in his voice, about being misled by President Lyndon Johnson. *Id.* at 4:9–11. He, like many congressmen and senators, believed that the President would not order a wider war. *Id.* “[A]t that stage in my life, I thought presidents told the truth. I may have been naïve, but that’s what I thought.” *Id.* at 4:20–22. McGovern thought that President Johnson would have gone ahead to expand United States involvement in Vietnam, even without the Gulf of Tonkin Resolution. *Id.* at 6:11–13. However, McGovern remembers that it gave the appearance of authority for President Johnson to do “whatever he wanted to do, despite his assurances that he had no intention of committing more troops or deepening our involvement there.” McGovern Transcript, *supra* note 244, at 6:14–16.

258. *Id.* at 8:9–11.

259. *Id.* at 1:17–18. McGovern quipped, “it may surprise you to know that . . . there isn’t a lot of communication between the House and the Senate until we get to Conference Committee.” *Id.* at 1:8–11.

260. *Id.* at 8:21–22.

261. McGovern Transcript, *supra* note 244, at 8:14–15.

262. *Id.* at 8:22–25. In McGovern’s mind, this was the “horror of horrors.” *Id.* at 9:1. He also seemed weary that either of the major party candidates would usurp the substance of the independent’s platform if the independent candidate had a “good platform” and got “a sizeable vote as [Senator Robert] LaFollette did in 1924.” *Id.* at 8:16–20.

Anderson made a run for the presidency on principle more than anything else.²⁶³ He does mention, however, that he does not think that Anderson's bid for the presidency as an Independent in any way affected Reagan getting elected, in terms of taking votes.²⁶⁴ Although, had Anderson been elected, that would have undoubtedly been a preferential course of history for a vastly liberal McGovern.²⁶⁵

Though McGovern recognized the difficulty an independent candidate would have to overcome to succeed in beating out two major party candidates, he admired Anderson's resolve for trying to win, as well as his clear presentation of the issues.²⁶⁶ "I think it took courage for John to do that and I'm glad that he did."²⁶⁷ In 1980 "we needed some voice other than Carter and Reagan. They didn't cover some of the issues that I thought were very important, and John did."²⁶⁸ In McGovern's estimation, Anderson, whose straightforward nature seamlessly coalesced with the role he played as an independent candidate, "served a useful purpose" in the 1980 election.²⁶⁹ When questioned as to how much Anderson's campaign has "opened the door for success of third-party candidates," McGovern thought that it had and that an upcoming candidate could build upon Anderson's ideas, stating "he's probably got some good pointers" as well.²⁷⁰

Finally, when asked whether there was anything that George McGovern thought people should know about Anderson, he said that he "never heard one whisper against his character, against his integrity. Never."²⁷¹

IV. WHY DID AN INSIDER EMBRACE THE OUTSIDERS?

The obvious question, after sifting through the story of John Anderson's life, is why an individual connected to the dominant group in society via race, religion, and gender, would direct his professional career towards im-

263. *Id.* at 9:2-3.

264. McGovern Transcript, *supra* note 244, at 9:3-5.

265. *See id.* at 21:16-21.

266. *See id.* at 21:8-21. McGovern further discusses Anderson's presidential platform saying, "I happened to have agreed with him on most of what he said." *Id.* at 21:19-21.

267. *Id.* at 23:5-6.

268. McGovern Transcript, *supra* note 244, at 23:7-10.

269. *Id.* at 23:10. McGovern was never "tempted" to take on the role of the third-party candidate and "thought it was better to battle it out in the [d]emocratic ranks and hope you could win a nomination." *Id.* at 23:11-14.

270. *Id.* at 24:16-22.

271. *Id.* at 34:12-16. McGovern extrapolated, "You know, they say that Republicans have financial scandals and Democrats have sex scandals. I never heard of either one around John." *Id.* at 34:16-19.

proving the lives of those with whom he shares minimal commonality?²⁷² What appears influential, related to Anderson's behavior, is a sense of social justice and an empathic response to humanity, all key elements to models of civic professionalism emerging within educational and philosophical literature. As Thomas Skrtic points out, "civic professionalism restores a sense of collective social purpose in the professions. It recognizes the professions' responsibility to the community—especially to those most negatively affected by social problems" and "that the point and value of professional service is its contribution to the good society and the good life for all."²⁷³ In a time flushed with rampant expertism, where politics and professionalism created narrow views of competence, devoid of any sense of social or moral obligation to the greater good, John Anderson emerged as a civic professional with equality and justice forming the foundation for his work.²⁷⁴

A. *Civic Professionalism*

Utilizing concepts of social justice and pragmatism as a foundation, contemporary philosophers such as William Sullivan describe a current crisis in professionalism related to rampant technocratic expert-driven practices.²⁷⁵

272. While it is impossible to prove the nature of Anderson's actions through some type of scientific pursuit, utilizing his statements as a backdrop against psychological, biological, social, and political theory might render interesting notions related to his life. *Id.* Though Anderson notes that he is not completely sure why he chose the path he did in life, as an obvious advocate of equal rights for all people, he posits that it may be because he is "well-circulated around the globe" and has "wide tastes when it comes to reading and literature." Anderson Transcript I, *supra* note 2, at 56:4–5.

273. Thomas M. Skrtic, *A Political Economy of Learning Disabilities*, 28 LEARNING DISABILITY Q. 149, 152 (2005).

274. See generally WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (1995) [hereinafter SULLIVAN, *WORK AND INTEGRITY*].

Work and Integrity . . . examines the crisis as well as the promise of professionalism in contemporary society. This . . . book argues for the importance of a new civic professionalism that reflects the ideals of democracy and public service in our ever more complex economic environment. . . . *Work and Integrity* explores the most current thinking on the various—and often conflicting—ways in which the concept of professional work is understood.

See *id.* at dust jacket, front flap.

275. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 5–7. It has been argued that "technocratic and expert-driven tendencies in government . . . further alienate citizens from the political process" as opposed to "build[ing] a habit of participative and informed political discussion between government and citizens." Marietjie Myburg, *More Public and Less Experts: A Normative Framework for Re-connecting the Work of Journalists with the Work of Citizens*, GLOBAL MEDIA J., AFRICAN ED., 2009, at 1, 1 available at [http://sun025.sun.ac.za/portal/page/portal/Arts/Departementel/Joernalistiek/Global+Media+Journal/Global+Media+Journal+-+Past+Editions+3\(1\)](http://sun025.sun.ac.za/portal/page/portal/Arts/Departementel/Joernalistiek/Global+Media+Journal/Global+Media+Journal+-+Past+Editions+3(1)).

A perceived lack of interest in social justice and political responsibility, coupled with an unbridled desire for economic and social status, define a type of professionalism grounded in both individualism and expertise.²⁷⁶ This set of expert professionals stays insulated from political or social obligations and does not recognize a connection between professional practice and the proliferation of a civil society.²⁷⁷ Furthermore, technocratic professionalism would not be viewed as a vehicle for promoting change or social progress, given its relative disconnect to political responsibility within a democracy defined by market liberalism.²⁷⁸

Consequently, discussions of civic professionalism, rooted in pragmatic philosophy and concepts of social justice, constitute a rethinking of professional training and indoctrination.²⁷⁹ Civic professionals display a commit-

276. STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 40–41 (1994).

The primary definition [of professionalism] is that of individual professionalism: the idea that membership of a profession carries with it a set of internaliz[ed] values that will be reflected in the way in which work is carried out and the ethical standards that are adhered to. . . . Although the term “professionalism” is associated with a fairly specific range of high-status occupations, much the same claim about other occupations is embodied in terms like . . . “public service ethos.”

Posting of John Quiggin to, Word for Wednesday Professionalism: Definition, <http://www.johnquiggin.com/archives/001491.html> (Sept. 10, 2003). While Anderson appeared to be headed for this type of professionalism, an ironic position in life changed that course. See Anderson Transcript I, *supra* note 2, at 16:18–25. Public service was the farthest thing from Anderson’s mind when he decided to pursue a legal career; rather he sought individual prosperity. See *id.* He believed the best direction was a traditional practice of law where you started with a firm and then formed your own firm. *Id.* The most rewarding part of his career however was campaigning for the presidency in 1980. *Id.* at 38:16–19. Though this course seems grounded in individualism, Anderson was finally free of the restrictions that were placed on him by conservative Republican leadership, enabling him to just crisscross the country and openly speak with people. *Id.* at 39:2–3.

277. See BRINT, *supra* note 276, at 15. Anderson has done exactly the opposite. See Anderson Transcript I, *supra* note 2, at 55:5–20. Rather than insulate himself from political obligations, he has stood front and center championing causes such as ERA and fair housing. *Id.* What is more poignant is that Anderson could have easily remained insulated within his privileged status, but it was his close connection to the people whom he fought for—a product of his life experiences—that drew him outside his comfort zone. See *id.* at 55–56.

278. See BRINT, *supra* note 276, at 82.

279. See Skrtic, *supra* note 273, at 152; see also William M. Sullivan, *Engaging the Civic Option: A New Academic Professionalism?*, CAMPUS COMPACT READER, special ed. 10, 12–13 (2003).

The concept of civic professionalism points to the public functions and social responsibilities of the professions. . . . To practice one’s profession in a public-regarding way in a full and direct sense, professionals must view themselves as active participants in civic life. They must cast their identities, roles, and expertise around a democratic, public mission, suffusing their technical competence with civic awareness and purpose.

ment to social justice and acknowledge the need for political engagement to resolve complex social problems, whether or not the issue personally affects them.²⁸⁰ Professional ethics dictate involvement in policy and politics as a means through which to resolve the disenfranchisement and inequity experienced by the citizenry.²⁸¹

While demonstrations of civic professionalism are certainly evidenced by historical figures such as John Dewey and Jane Addams, the dominance of expertism has overshadowed its relevance and viability over time.²⁸²

Scott J. Peters, *Educating the Civic Professional: Reconfigurations and Resistances*, 11 MICH. J. COMMUNITY SERV. LEARNING 47–48 (2004).

280. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 228. In Anderson's case, this meant fighting for women's rights and fair housing. Anderson Transcript I, *supra* note 2, at 55:6–17. In opposition of the technocratic professional who is disconnected to social and political responsibility, see BRINT, *supra* note 276, at 82, Anderson was able to connect to the people whom he fought for because his life experiences left him open to accepting new ways and new ideas. See Anderson Transcript I, *supra* note 2, at 56:16–24.

281. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 232; Peters, *supra* note 279, at 47–48. Anderson embodies this type of ethical professionalism. See Anderson Transcript I, *supra* note 2, at 25:3–27:23. This is clearly evidenced by his involvement in securing the vote that assured the passing of the Fair Housing bill and particularly how he secured the vote. See *id.* at 26:10–27:5. Anderson was moved by a young well-educated African American who was living the inequity experienced by the citizenry and unable to secure housing for his family. 114 CONG. REC. 9551 (1968) (Statement of Rep. John B. Anderson); see also *id.* at 9557–58 (Statement of Rep. John B. Anderson) (elaborating on statement from previous cite). In an unconventional act—an act of heroics perhaps forged out of his own understanding of humble beginnings—Anderson jumped party lines knowing that his vote would break the tie and pass the Fair Housing bill. See 24 CONG. Q. ALMANAC 152, 165 (1968).

282. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 74–76. John Dewey and Jane Addams understood the

interdependence of modern society which the industrial metropolis dramatized, [and] sought to render its complex functional interrelationships intelligible Providing this intelligibility was for them the professional calling par excellence. By bringing the interdependence to vivid public awareness, they hoped to provoke political action. Aroused publics would then struggle for conscious regulation and planning of what would otherwise have remained but dimly perceived, . . . benefiting the powerful few but harming the many.

Id. at 72. “During the 1890s, John Dewey articulated [his] philosophy of . . . ‘creative democracy’ at the . . . University of Chicago.” *Id.* at 73. Dewey “concluded that developing a democratic public would require creating institutions within which learning could become a continual practice in all areas of life. . . . [and] sought to develop a cultural understanding that would orient professional life there toward public concerns.” *Id.* at 74. Jane Addams collaborated with Dewey, for “Addams was seeking to involve the entire community in an educational effort whose aim was to form active and responsible citizens.” *Id.* at 77. To accomplish this, she pioneered the Hull House which reached out to “young men and women”—immigrants “only a short remove from their peasant origins”—and aimed to give them an “understanding of the industrial metropolis.” SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 76. Like Dewey and Addams, Anderson embodies the civic professional who is unfortunately a minority in the political scheme, following his heart as opposed to the technocrat, who has lost his identity and is forced into action by social obligations.

However, renewed interest in the merits of pragmatism and civic professionalism are emerging, in response to burgeoning organizational, societal, and educational problems in current society.²⁸³ Given this, it is necessary to explore the type of democracy, understanding of social justice, and method of problem solving through which the professional engages in order to understand this continuum between expert and civic professionalism.

1. Democracy

While its conceptualization varies widely, democracy can be subsumed under two generic models that inherently affect professionalism: A weak, elitist model and a strong, participatory one.²⁸⁴ The political theory of market liberalism provides philosophical grounds for weak democracy.²⁸⁵ In a

283. See Peters, *supra* note 279, at 47; Kerry J. Kennedy, *Rethinking Teachers' Professional Responsibilities: Towards a Civic Professionalism*, 1 INT'L J. CITIZENSHIP & TCHR. EDUC. 3, 3 (July 2005). An example of this renewed interest is the No Child Left Behind Act of 2001. 20 U.S.C. § 6301 (2006). The Act was designed with the theory that setting high standards and establishing measurable goals can improve individual outcomes in education. *Id.* To achieve this, the Act requires states to develop assessments in basic skills to be given to all students in certain grades. *Id.* The act was proposed by President Bush and shepherded through the Senate by Ted Kennedy. Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239, 1243 (2009). It received overwhelming bipartisan support and, despite criticism of its overall effectiveness, Congress increased federal funding for education by forty percent in 2007. See Press Release, U.S. Dept. of Educ., Fiscal Year 2007 Budget Request Advances NCLB Implementation and Pinpoints Competitiveness (Feb. 6, 2006), available at <http://www2.ed.gov/news/pressreleases/2006/02/02062006.html>. Thus, this legislation represents Congress' coming together as civic professionals for a common cause rather than as socially and politically obligated technocrats. See Peters, *supra* note 279, at 47.

284. See BENJAMIN R. BARBER, A PLACE FOR US: HOW TO MAKE SOCIETY CIVIL AND DEMOCRACY STRONG 20–21 (1998); JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 9 (Will Kymlicka et al. eds., 2000) [hereinafter DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND].

285. BARBER, *supra* note 284, at 20–22; see DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND, *supra* note 284, at 9. Market liberalism is a descendent of classical liberalism, classical denoting before the 20th century. See J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 561–62 (2004). Classical liberals believe the individual should be free from the state and thus stand in direct contrast from social liberals who believe in a welfare state. See *id.* at 543, 561. In a welfare state, public funds are used to support the needy. See Richard M. Ebeling, *National Conflicts, Market Liberalism and Social Peace*, FREEDOM DAILY, May 1994, available at <http://www.fff.org/freedom/0594b.asp>. Classical liberals oppose this, presumably, because as an elitist group it is the funds of the private wealthy sector which are redistributed in the form of taxes to support the needy. See *id.* This redistribution of private wealth infers government interference with the individual's right to choose. See *id.* Therefore, the market or classical liberalism theory suggests a weak democracy because of its focus on the individual. See *id.*

tradition of political thought ranging from the works of James Mill and Jeremy Bentham in the early nineteenth century to Joseph Schumpeter and Anthony Downs in the twentieth, utilitarian philosophy helps frame the most important idea in market liberal theory: the self's primary and innate motivation is to maximize the satisfaction of its own desires and preferences.²⁸⁶ Freedom for market liberals means the right to pursue individual interests without interference from either the state or other individuals.²⁸⁷ Given this, technocratic professionals would enjoy similar benefits by engaging in professional behavior targeted to individual advancement despite the presence of social inequity.²⁸⁸

Unlike the weaker forms of democracy, strong democratic forms exhibit a "double democratization," where not only the organization of government but also social and economic institutions require the substantive participation and judgment of ordinary citizens.²⁸⁹ One model of democracy, known as

286. See DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND*, *supra* note 284, at 9 (At its core, liberalism is "based on the assumption that individuals are mostly motivated by self-interest rather than any conception of the common good."). See generally Terence Ball, *An Ambivalent Alliance: Political Science and American Democracy*, in *POLITICAL SCIENCE IN HISTORY: RESEARCH PROGRAMS AND POLITICAL TRADITIONS* 41–65 (James Farr, et al. eds., 1995). Utilitarianism can be described as "the greatest good for the greatest number" of people. New World Encyclopedia, Utilitarianism, <http://www.newworldencyclopedia.org/entry/Utilitarianism> (last visited Feb. 24, 2010). To achieve this, the market liberalist believes that the state should be separated "from all economic activity." Ebeling, *supra* note 285.

287. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND*, *supra* note 284, at 9.

288. See BRINT, *supra* note 276, at 41; see also SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 23. To insure the passing of the Fair Housing Act, Anderson, who could not focus on advancing himself while he knew others had no access to basic opportunities, crossed party lines. See 24 CONG. Q. ALMANAC 152, 165 (1968). While this did not sit well with his fellow republicans, Anderson felt this was one of the most useful pieces of legislation he helped pass while in Congress. Anderson Transcript I, *supra* note 2, at 25:21–24. All this effort because of a young man whom Anderson knew was qualified for yet deprived of similar opportunities. *Id.* at 29:3–12.

289. DAVID HELD, *MODELS OF DEMOCRACY* 283 (1987). The weaker forms of democracy are evidenced by the market liberalism—laissez-faire—theory which thrives on individualistic pursuits. See Ebeling, *supra* note 285. This is in direct contrast with the civic professional who thrives in a participatory democracy where the government, through the voice of the people, provides social services and helps regulate industry. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 228. Anderson embodies that civic minded professionalism. He believes in the power of participation and awaits "a new era, when [the] American administration will concede that international law" plays "an important role in determining our conduct as well as the conduct of other countries." Anderson Transcript I, *supra* note 2, at 149:8–13.

developmental liberalism,²⁹⁰ contains the language of compassion, equality, social and civic mindedness, dispositions, and attitudes it insists must permeate all institutions, not just political ones.²⁹¹ Strong democratic citizens would actively and jointly balance private and public interests always in consideration of the common good.²⁹² Such citizens recognize their dependency and need for one another not only in personal projects of self-development, but also in collective efforts to improve society.²⁹³ These citizens would constitute the cadre of civic professionals, motivated to utilize knowledge and expertise for advancement of the total citizenry.²⁹⁴

2. Social Justice

Encapsulated in notions of equal rights, protections, opportunities, and obligations for all, philosophies of social justice appear not only in the historical and contemporary rhetoric of American laws and constitutions, but also in the professional indoctrination of doctors, social workers, educators, and the like.²⁹⁵ How professional and political arenas support notions of social justice within policy and practice is entirely variable and has led to an overall weakening or attenuation of the foundational ethics and morals of the concept.²⁹⁶ This phenomenon, some might argue, correlates directly with the individualism and political disengagement afforded within a capitalistic society and weakened democracy described above.²⁹⁷

From a technocratic perspective, issues related to social justice would be regulated through the markets, not through governmental or universal social programs, and would hinge upon a fundamental acceptance that some

290. JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 228 (Prometheus Books 2000) (1935) [hereinafter DEWEY, *LIBERALISM*]; see also C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 47 (1977).

291. DEWEY, *LIBERALISM*, *supra* note 290; see JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 25, 137 (Paul Monroe ed., 1916) [hereinafter DEWEY, *DEMOCRACY AND EDUCATION*].

292. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 228.

293. *Id.*; see also J. Robert Kent, *A Global Challenge: Reframing Democracy and Education*, 41 AM. STUD. 375, 377 (2000). Anderson recognized this need for a collective effort to benefit society when in an unorthodox move he jumped party lines to secure the crucial Fair Housing vote. See 24 CONG. Q. ALMANAC 152, 165 (1968).

294. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 237.

295. See Colleen Galambos, *A Dialogue on Social Justice*, 44 J. SOC. WORK EDUC. Spring/Summer 2008, at 1, 4 (concluding that these professions are inherently bound to a code of ethics which include the moral obligation to support society and its needs respective to their profession).

296. See BRINT, *supra* note 276, at 8.

297. See HELD, *supra* note 289, at 283.

citizens may never have their basic needs met.²⁹⁸ Given this, an expert professional would not have to incorporate philosophies or policies within the scope of his or her work that would address such concerns.²⁹⁹ This is not to say that expert professionals could not maintain personal values related to the promotion of social justice and equality for all; they very well might.³⁰⁰ The important point is that technocrats would avoid consuming professional time in order to address societal maladies, seeing those issues as separate and distinct from their responsibilities.³⁰¹

On the other hand, civic professionalism requires the participation of professionals in the process of targeting and solving societal problems in order to promote the ideal that all citizens deserve a basic and equitable set of social rights.³⁰² This conceptualization of social justice depends upon the professional training of a cadre of civic professionals, willing to share expertise in order to promote the greater social good.³⁰³ While these professionals undoubtedly benefit both personally and professionally from their expertise, this deep sense of social obligation consistently guides and influences their actions.³⁰⁴ Most importantly, civic professionals do not have to be racially, socially, or financially representative of those for whom they advocate because their sense of social equity and interdependence precedes all other incongruities.³⁰⁵

298. HILDA BLANCO, *HOW TO THINK ABOUT SOCIAL PROBLEMS: AMERICAN PRAGMATISM AND THE IDEA OF PLANNING* 201 (1994); *see also* JOHN S. DRYZEK, *DEMOCRACY IN CAPITALIST TIMES: IDEALS, LIMITS, AND STRUGGLES* 21 (1996) [hereinafter DRYZEK, *DEMOCRACY IN CAPITALIST TIMES*]. Case in point is the current health care crisis in America. *See* DRYZEK, *DEMOCRACY IN CAPITALIST TIMES*, *supra*, at 201. It is argued that some government regulation is needed to assure that citizens receive basic health care. Christopher Beam, *McCan't and McShouldn't: At a Kansas City Forum, John McCain and Mitch McConnell Show Why Bipartisanship on Health Care Is Impossible*, SLATE, Aug. 31, 2009, <http://www.slate.com/id/2226793/?from=rss>. Currently, while the market controls the system, there are many citizens whose basic needs are not being met. *Id.*

299. *See* BRINT, *supra* note 276, at 9.

300. *See id.* at 36.

301. *See id.* at 10.

302. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 151; *see also* Kennedy, *supra* note 284, at 3.

303. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 187. The preference inferred from Sullivan's work is that not just training is needed, but that the type of training should be civic professionals training *other* civic professionals. *See id.* Anderson fulfills this call to duty as a law professor, ensuring that his ideals carry on through his students. *See* Anderson Transcript I, *supra* note 2, at 107:25–108:1.

304. *See* SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 151.

305. *See id.* at 129. Most of Anderson's fights have been for people with whom he shares no similar class identity, as well as for issues from which Anderson is completely removed, such as a women's right to choose. Anderson Transcript I, *supra* note 2, at 91:20–92:1.

3. Practice

Shaped by models of democracy and perceptions of social justice, professionals enter the arena of problem solving and practice in very different ways given the presence of this expert-civic continuum of professional behavior.³⁰⁶ Guided by a market liberal democracy, technocratic professionals need not participate in policy-making to any significant extent, with the majority of their professional time spent in individual pursuits.³⁰⁷ As highly specialized professionals, technocrats find little use for collaboration, relying instead upon expertism and status to diffuse the need for problem solving.³⁰⁸ By staying focused on individual work, expert professionals allow market liberalism to diffuse organizational, political, or societal obligations to the maximum extent possible.³⁰⁹ In the event that a technocrat chose to enter a policy or political arena, he or she would do so armed with ideological arguments and theories all deeply embedded within their particular expertise and philosophical framework.³¹⁰

In contrast, civic professionals understand the delicate balance between individual gain and the greater social good, acknowledging that practice and policy-making must occur at multiple levels beyond individual work.³¹¹ Collaboration would be viewed as an important vehicle through which to promote change, and the civic professional would be comfortable maneuvering amongst diverse practitioners in order to achieve goals.³¹² While civic professionals would utilize their expertise to work directly with the populace, they would also engage in policy-making and political activities at an organi-

306. See Kimberly Ann Harrison, *Understanding Professionalism in Education* 15 (Dec. 2003) (unpublished Ph.D. dissertation, University of Kansas) (on file with Nova Law Review).

307. See Brint, *supra* note 276, at 38–39.

308. See *id.* at 39.

309. See *id.*

310. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 185. Technocrats embody today's modern day political conservative who does not dispense with their values despite people's needs. Harrison, *supra* note 306, at 46–47. For example, while many of today's citizens need basic health care, technocrats, such as Mitch McConnell, still believe there is no problem. See Beam, *supra* note 298. During Anderson's campaign for presidency, Anderson introduced television ads in which Gerald Ford articulated, "Anderson never votes with his party, he always votes with his conscience." Ford's remarks represent a truism of Anderson that is evidenced by his decision to jump party lines for Fair Housing. See 24 CONG. Q. ALMANAC 152, 165 (1968).

311. See SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at 214–15.

312. *Id.* at 231; see also HENRY MINTZBERG, *STRUCTURE IN FIVES: DESIGNING EFFECTIVE ORGANIZATIONS* 154–55 (1993).

zational and societal level in order to promote macro-level responses to social problems.³¹³

Fundamental to the collaborative acts of the civic professional, acknowledgment of the tenuous delicate nature of problem solving requires a pragmatic approach to the work.³¹⁴ While various definitions of pragmatism exist, philosophies of political pragmatism focus upon creating and maintaining a civil society without engaging in ideological attacks or rhetoric.³¹⁵ Though diversity within the pragmatic school of thought exists, efforts to utilize inquiry form the basis for determining any necessary action.³¹⁶ Originating with the work of Charles Sanders Peirce and William James, and expanded upon by political progressives such as John Dewey, emphasis was placed upon practicality in problem solving, outside the realm of conjecture and speculation.³¹⁷ Furthermore, Dewey stressed that the only way to resolve emergent and complex social problems was to afford individuals opportunity for civil rights and, most importantly, civic education.³¹⁸ Critical to the pragmatic philosophy is the concept of the “*via media*,”³¹⁹ the practice of finding the middle ground from which to begin resolving issues, as opposed to ideological entrenchment based upon identity, political affiliation, or the like.³²⁰ Thus, civic professionals engage in pragmatic problem solving by incorporating the various expertise, knowledge, and beliefs of the stakehold-

313. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 231; see also Harrison, *supra* note 306, at 65 fig. 2.

314. See BLANCO, *supra* note 298, at 181; see also SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 172.

315. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 53 (2003). It has been suggested by some that the political pragmatist “is concerned with using both the right means for the right ends, and is willing to let experience inform his assumptions, while the ideologue is indifferent to the means used and willfully ignorant of experience that challenges his assumptions.” Tobin Harshaw, *Pragmatism, Viewed Pragmatically*, THE OPINIONATOR, Dec. 12, 2008, <http://opinionator.blogs.nytimes.com/2008/12/12/pragmatism-viewed-pragmatically> (last visited Feb. 26, 2010).

316. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 172.

317. BLANCO, *supra* note 298, at 25–27. The reasons for this are twofold: first, practicality in problem solving aids in the resolution for those without resources in an expedient manner, and second, practicality in problem solving utilizes fewer resources. See *id.* at 23–29. When one takes the most practical approach to utilizing resources, unnecessary expenses are avoided. See *id.*

318. See DEWEY, DEMOCRACY AND EDUCATION, *supra* note 291, at 77.

319. Wilfrid Sellars, *Language, Rules, and Behavior in JOHN DEWEY: PHILOSOPHER OF SCIENCE AND FREEDOM* 289 (Sidney Hook, ed., 1950). “Civic education . . . prepares people of a country, especially the young, to carry out their roles as citizens.” Stanford Encyclopedia of Philosophy, Civic Education, Dec. 27, 2007, <http://plato.stanford.edu/entries/civic-education>.

320. See POSNER, *supra* note 315, at 53.

ers in an efficient manner, carefully avoiding ideological exploitation in order to arrive at an equitable and timely resolution to any given problem.³²¹

B. *John Anderson as a Civic Professional*

John Anderson's commitment to social justice, combined with the pragmatic manner in which he entered and shaped political debate and action throughout his career, appears to cast him as a contemporary civic professional.³²² Anderson's abilities to cross party lines, to advocate for those with whom he had little in common, and to stay firmly rooted in a commitment to equality demonstrate the synthesis of a collective political, civic, and social sense of responsibility necessary to promote the greater good.³²³

While John Anderson's professional training as a lawyer might have kept him grounded in technocratic practices, entering the political arena foreshadowed his increasing awareness of social problems and his future relevancy in American politics.³²⁴ Furthermore, when Anderson could have adopted a market liberal approach to his work given his background and identity, he engaged in the type of participatory political behavior sympathetic to constructions of deliberative democracy and civic professionalism throughout his career by working collaboratively alongside conservatives and liberals alike to create social change.³²⁵

321. SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 231–32; *see also* Harrison, *supra* note 306, at 64.

322. Anderson Transcript II, *supra* note 3, at 4 (“I do think that this deeper ethic, humanistic ethic, that you have described of civic professionalism was an important element in fashioning my political career. Because that was the event, not to go endlessly about this one matter, that brought me really nationwide attention.”).

323. *See* 24 CONG. Q. ALMANAC 152, 165 (1968). Anderson crossed these party lines and voted with democrats to ensure the passing of the Fair Housing Act. *Id.* Further, most of Anderson's fights have been for people with whom he shares no similar class identity as well as for issues from which Anderson is completely removed such as a woman's right to choose. *See* Anderson Transcript I, *supra* note 2, at 91:20–92:1.

324. *See* Anderson Transcript I, *supra* note 2, at 29:3–18. Yet, public service was the farthest thing from Anderson's mind when he decided to pursue a legal career; rather, he sought individual prosperity. *Id.* at 16:18–22. He believed the best direction was a traditional practice of law where one started with a firm and then formed his or her own firm. *Id.* at 16:18–25. The most rewarding part of his career, however, was campaigning for the presidency in 1980. *Id.* at 38:16–19. Though this course seems grounded in individualism, Anderson was finally free of the restrictions that were placed on him by conservative Republican leadership, enabling him to just crisscross the country and openly speak with people. *Id.* at 38:20–39:3.

325. This is, in one instance, evidenced by his unorthodox move across party lines to pass the Fair Housing Act. *See* 24 CONG. Q. ALMANAC 152, 165 (1968).

Also symbolic of civic professionalism, John Anderson remained firmly rooted in the ideal of social justice, even at the expense of his own political opportunity at times.³²⁶ The fact that Anderson openly opposed political allegiances in order to prohibit discriminatory housing practices, as evidenced by his support of the Open Housing Act of 1968, demonstrates just one example of his commitment to social justice, despite historical and environmental factors in his life that might have pointed towards contradictory actions.³²⁷

Similarly, evidence of pragmatism can be found in John Anderson's professional practice, particularly because his actions were not reflective of the kind of radicalism or "identity politics" often rooted in expertism.³²⁸ Resisting entrenchment in political labels, Anderson pursued political and policy-making activities at multiple levels, remaining carefully focused upon equity as the ultimate goal while working alongside diverse groups of people to achieve such outcomes.³²⁹ By consistently maintaining a core set of social justice beliefs, coupled with an ability to focus on the issue and not the emotion or idealism behind the issue, Anderson contributed to the advancement of civil rights by targeting and ameliorating problems in an efficient and logical fashion.³³⁰

As would be the case for any civic professional in an environment dominated by a weak democracy and rampant expertism, John Anderson's political methods were not always appreciated.³³¹ Yet, this deep sense of civic-mindedness kept him firmly entrenched in the ethics and values of equity.³³² Furthermore, in keeping with notions of civic professionalism, Anderson was willing to put his political career at stake because of this commitment to the greater social good.³³³ As Anderson notes:

326. See Anderson Transcript I, *supra* note 2, at 29:22–30:12. While Anderson's move across party lines did not sit well with his own political party, it was nevertheless one of his most rewarding moments in Congress. *Id.* at 25:21–26:23.

327. See *id.* Another example of his unorthodox motivations was his fight for women's rights; he championed many causes in which he had no social, class, or gender ties. See *id.* at 91:20–92:1.

328. See *id.* at 25:21–24.

329. See Anderson Transcript I, *supra* note 2, at 25:21–26:23.

330. See *id.* at 27:1–5. This core of beliefs likely stems from Anderson's life experiences. See *id.* at 55:17–57:10. He was "able to meet people from all walks of life" who represented various viewpoints, and he admired and embodied the "open mindedness and the willingness to accept new ways [and] new ideas." *Id.* at 56:19–23. This was the road that he chose to travel. *Id.* at 56:16–24.

331. See Anderson Transcript I, *supra* note 2, at 27:6–10, 103:8–17.

332. See Anderson Transcript II, *supra* note 3, at 1.

333. See *id.*

I do think that this deeper ethic, humanistic ethic, that you have described of civic professionalism was an important element in fashioning my political career. . . . I was always pretty well satisfied that the course I have chosen was the best one for me. . . . [I]t gave me the inner satisfaction of knowing that even though I'd failed in the one attempt I've described—[running for president]—that nevertheless I had, for my own sake, done the things and followed the path that I thought was best.³³⁴

C. *Anderson's Evolution as a Civic Professional*

Given the relative impossibility in knowing whether biology played a role in Anderson's empathic response to human rights and other social justice issues, exploring relevant environmental factors offers an interesting opportunity for speculation and analysis.³³⁵ And, while Anderson appears to be an "insider" for many reasons, including the fact that he is an educated, white male in American society, many elements of his life cast doubt upon the assumption that Anderson remained insulated in that status.³³⁶ Moreover, the empathic, altruistic behaviors developed over Anderson's history seem to form the foundation for the civic, pragmatic, and political approach he utilized to influence politics and public policy.³³⁷

In considering Anderson as a civic professional, discussions related to social justice and empathy inherent to the model ignite the nature-nurture debate and call into question how an individual develops those tendencies.³³⁸ Research suggests that individuals who display caring, empathetic types of

334. *Id.* at 4.

335. See generally Christopher Boehm, *Purposive Social Selection and the Evolution of Human Altruism*, 42 CROSS-CULTURAL RES. 319 (2008).

336. See Anderson Transcript I, *supra* note 2, at 33:3–17. What are the many elements that have prevented him from being insulated—any element exposed to outsiders: world's fair, military, etc.—and exposed him to outsider issues?

337. See *id.* at 169:13–24; Anderson Transcript II, *supra* note 3, at 1.

338. See generally Boehm, *supra* note 335. The nature versus nurture debate is one of the oldest debates in psychology. See Kimberly Powell, *Nature vs. Nurture: Are We Really Born That Way?*, ABOUT.COM, Sept. 17, 2009, http://genealogy.about.com/cs/geneticgenealogy/a/nature_nurture.htm. Even Shakespeare's Iago confides in Roderigo, "I am not what I am." WILLIAM SHAKESPEARE, *THE TRAGEDY OF OTHELLO* act 1, sc.1. The debate essentially poses the question: Why are we the way we are? I got my eyes from my mother, but where did I get my personality and talents, or weaknesses for that matter? Did I learn this from my parents and environment, or was I born with it? See Powell, *supra*. Anderson's traits stem from a mix of his family, school, and the church. Anderson Transcript I, *supra* note 2, at 3:1–3. In particular, his desire for social justice, to give back to the people, arguably stemmed from working at his father's grocery store where he stocked shelves, sacked potatoes, and carried groceries for the elderly women. *Id.* at 3:19–24.

behavior towards others do so because they are environmentally shaped that way.³³⁹ An example of this can be drawn from the disability community and their struggle endured over decades to achieve equal rights and opportunities.³⁴⁰ Many parents who championed the rights of children with disabilities in the 1970s did so because their children were directly affected by the disability and by the lack of educational opportunities afforded them.³⁴¹ Other environmental factors hinge on rewards or status gained by displaying the empathetic, altruistic behavior towards others.³⁴² It would make sense that the deep commitment to social justice exhibited by civic professionals might originate from responses to environmental inequity and the marginalization of certain citizenry.³⁴³

However, increasing research is actually being targeted to the biological derivations of empathy with suggestions mounting that empathetic behavior may be predicated upon genetic predictors.³⁴⁴ Regardless, speculations of

339. See Frans B.M. de Waal, *Putting the Altruism Back into Altruism: The Evolution of Empathy*, 59 ANN. REV. PSYCHOL. 279, 282 (2008).

340. See generally DANIEL P. HALLAHAN & JAMES M. KAUFFMAN, TEACHING EXCEPTIONAL CHILDREN: CASES FOR REFLECTION AND ANALYSIS FOR EXCEPTIONAL LEARNERS (7th ed. 1997). It was not until 1987 that the New York City Council approved Local Law 58 which required the city's buildings to be handicapped accessible. Anthony DePalma, *Mandating Access for the Handicapped*, N.Y. TIMES, Nov. 6, 1988, at A1. Further, it was not until 1991 that Congress mandated a nationwide law that required multifamily housing to be handicapped accessible. *Id.*

341. See National Research Center on Learning Disabilities, Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, <http://www.nrcld.org/resources/osep/historyidea.html> (last visited Feb. 26, 2010). In the early 1970s educational opportunities were limited for children with disabilities in U.S. schools. See *id.* Only one in five children with disabilities were educated and "many states had laws excluding certain students, including children who were deaf, blind, emotionally disturbed, or mentally retarded." *Id.* It was with the help of landmark cases such as *Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania* & *Mills v. Board of Education of the District of Columbia* that helped establish Public Law 94-142, Education for All Handicapped Children Act. *Id.* This Act was significant in developing major national goals for implementing educational programs for children with disabilities. *Id.*

342. See Brent Simpson & Robb Willer, *Altruism and Indirect Reciprocity: The Interaction of Person and Situation in Prosocial Behavior*, 71 SOC. PSYCHOL. Q. 37, 37-38 (Mar. 2008). One environmental factor which may affect an individual's empathetic behavior towards others is the "interaction of the person and situation." *Id.* at 50. "[R]esearch shows that egoists respond [more strongly to] the presence or absence of reputational incentives," while altruists "act altruistically at high levels not only when reputational incentives exist, but also when they do not." *Id.*

343. See SULLIVAN, WORK AND INTEGRITY, *supra* note 274, at 11.

344. See Aurora M. Nedelcu & Richard E. Michod, *The Evolutionary Origin of an Altruistic Gene*, 23 MOLECULAR BIOLOGY & EVOLUTION 1460 (2006). The altruistic gene theory presents the issue of whether selfish behavior is genetic and, if so, can one learn to be altruistic. *Id.* Richard Dawkins, in his book, *The Selfish Gene*, proposed that people were selfish

biological influences along with environmental ones related to civic professionalism are certainly worth considering.³⁴⁵ Contemplating the influences upon Anderson's personal and professional demonstrations of civic professionalism offers an opportunity to consider the relevance of context and motivation within his personal journey.

1. Family Influences

As Anderson notes, his father was born and raised in Sweden for many years prior to moving to the United States.³⁴⁶ Whereas Anderson himself did not experience the realities of living abroad and relocating to the United States as an immigrant, research supports the notion that individuals who experience living as the "minority" in a majority society tend to develop cultural awareness and reconfigure ethnocentric tendencies towards a broader world perspective.³⁴⁷ It is possible that Anderson's father might have in-

because the human gene pool is chemically selfish. John Hansen, *Richard Dawkins—The Selfish Gene*, SUITE101.COM, Aug. 9, 2009, http://americanfiction.suite101.com/article.cfm/richard_dawkins_the_selfish_gene (last visited Feb. 26, 2010); see also Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27 (1990). Nevertheless, while our genetic traits may be irreversible, they can be unlearned. Hansen, *supra*. Humans, unlike animals who experience this genetic makeup, are not compelled by their selfish genetic makeup. *Id.* Humans can learn through environmental influences to be altruistic. *Id.* Piliavin and Charng suggest that:

[T]here appears to be a "paradigm shift" away from the earlier position that behavior that appears to be altruistic must, under closer scrutiny, be revealed as reflecting egoistic motives. Rather, theory and data now being advanced are more compatible with the view that true altruism—acting with the goal of benefiting another—does exist and is a part of human nature.

Piliavin & Charng, *supra*, at 27.

345. See Boehm, *supra* note 335, at 342; see also J. Philippe Rushton et al., *Altruism and Aggression: The Heritability of Individual Differences*, 50 J. PERSONALITY & SOC. PSYCHOL. 1192, 1192, 1196–97 (1986), available at <http://psychology.uwo.ca/faculty/rushtonpdfs/Altruism%20and%20Aggression%201986.pdf>. The authors gave questionnaires to 573 adult twins of the same sex which "measured altruism, empathy, nurturance, aggressiveness, and assertiveness." Rushton et al., *supra* at 1192. The results suggested that "50% of the twins' variance in altruism, empathy, nurturance, aggressiveness, and assertiveness" were attributed to genetic influence. *Id.* at 1196. "[V]ery little, if any, of the twins' altruistic or aggressive tendencies [were a result] of their common, shared environment." *Id.*

346. See Anderson Transcript I, *supra* note 2, at 2:12–14.

347. See Anthony C. Ogden, *Ethnographic Inquiry: Reframing the Learning Core of Education Abroad*, FRONTIERS: INTERDISC. J. OF STUDY ABROAD 87, 109 (2006). It can be argued that Anderson was not a minority given that he lived amongst a majority of Swedish immigrants in a close-knit community. See LUNDIN, *supra* note 4, at 67. According to the 1930 U.S. Census, Swedish immigration in Rockford, Anderson's home town, comprised forty percent of the total population. *Id.* Rockford acquired the identification as a "Swede Town," as "Rockford Swedes occupied the office of both mayor and chief of police [and] controlled three national banks." *Id.*

stilled such values upon his family, having participated in a socially democratic society for many years.³⁴⁸

Another potential family influence relates back to Anderson's childhood. For example, it was not rare in that time period that half of Anderson's biological siblings died of disease during childhood.³⁴⁹ Although not atypical of the times, this certainly could portend later, empathic leanings as research suggests that kinship ties often increase the likelihood of altruistic behavior.³⁵⁰ As Anderson describes his family as "protective" and "close-knit," the impact of sibling death upon the psychological and social functioning of the family cannot go unnoticed.³⁵¹ Moreover, it warrants the hypothesis that Anderson learned to accept trauma and misfortune as human realities with no racial, economic, or gender barriers.³⁵²

Likewise, Anderson mentions that his father established a family-owned grocery business, through which his children participated in the daily operations in various capacities.³⁵³ Anderson notes the tremendous impact of the Great Depression upon his family's business, and the economic and social realities of the hardships he and others suffered.³⁵⁴ Again, this experience cultivated an opportunity for Anderson to experience life as a temporary "outsider," by witnessing and being influenced by the devastating consequences of poverty.³⁵⁵ Thus, empathic responses to issues related to social

348. Anderson Transcript II, *supra* note 3, at 2–3. Anderson recalled how his father's tolerance helped shape his life. *See id.* His father was "very tolerant of people regardless of their religious beliefs and religious faith and racial background and . . . accept[ed] people on the basis of [their] common humanity." *Id.* at 3. This tolerance seemed to stem from a "mixture of a striving for acceptance and a desire for greater equality that many immigrants felt." *Id.*

349. Anderson Transcript I, *supra* note 2, at 1:25–2:3. Before Anderson was born in 1922, three of his siblings had succumbed to diseases, one of whom was likely a victim of the 1918 influenza pandemic that swept the globe killing, by some accounts, 2.5% to 5% of the world's total population. Anderson Transcript II, *supra* note 3, at 5.

350. Jon K. Maner & Matthew T. Gailliot, *Altruism and Egoism: Prosocial Motivations for Helping Depend on Relationship Context*, 37 EUR. J. SOC. PSYCHOL. 347, 349 (2007).

351. Anderson Transcript I, *supra* note 2, at 2:4–11; Anderson Transcript II, *supra* note 3, at 5. Anderson proffers that the overly protective nature of his parents was likely a result of the childhood deaths of three of his siblings. Anderson Transcript II, *supra* note 3, at 5. He recalls that his father was particularly distraught from the loss of three of his children and, being as devout as he was, would make regular visits to their gravesites. *Id.*

352. VIMALA PILLARI & MOSES NEWSOME, *HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT: FAMILIES, GROUPS, ORGANIZATIONS, AND COMMUNITIES* 52 (1998).

353. Anderson Transcript I, *supra* note 2, at 3:19–25.

354. *Id.* at 3:9–12.

355. *See* Anderson Transcript II, *supra* note 3, at 7.

justice and social welfare tend to increase when individuals become intimately affected by social problems.³⁵⁶

2. Religious Influences

Anderson notes a conservative religious upbringing, which may have perpetuated a traditionalist approach to life for some individuals.³⁵⁷ Often, transmitting strict moralistic values within the family unit, if delivered consistently and repeatedly, are indelibly ingrained in the future actions and behaviors of the family members and can lead to intolerance and bigotry.³⁵⁸ On the other hand, exposure to basic moral values within the family can also increase the expression of ethics such as empathy and kindness, as well.³⁵⁹ Anderson discusses the role of religion without disdain, yet cannot fully commit to the notion that his sense of social justice originated with those experiences.³⁶⁰ However, Anderson may have knowingly or unknowingly reshaped certain ideals from this familial religious training into a worldview of acceptance.³⁶¹

356. See Nancy Eisenberg et al., *The Role of Sympathy and Altruistic Personality Traits in Helping: A Reexamination*, 57 J. PERSONALITY 41, 42–43 (1989).

357. Anderson Transcript I, *supra* note 2, at 11:11–12:3. Anderson says the church's approach to religion is to believe that "salvation was achieved through faith in Christ and that to achieve that required a public confession, and [living] by a very strict code." *Id.* at 11:25–12:3. Anderson stated that back then,

[The church] was very fundamentalist in its doctrine, and it believed in a public confession of faith and of living by very strict rules of conduct that included a willingness to eschew what were, at least by the standards of those early days, regarded as worldly pleasures. And you were encouraged to find other ways of amusing yourself other than attending the theater and so forth.

Id. at 12:13–20.

358. GEORGE A. APPLEBY, EDGAR COLON, & JULIA HAMILTON, *DIVERSITY, OPPRESSION, & SOCIAL FUNCTIONING: PERSON-IN-ENVIRONMENT ASSESSMENT AND INTERVENTION* 230–31, 238 (2d ed. 2007).

359. *Id.* at 230–31; see also BRENDA DUBOIS & KARLA KROGSrud MILEY, *SOCIAL WORK: AN EMPOWERING PROFESSION* (3d ed. 1999).

360. Anderson Transcript I, *supra* note 2, at 33:3–9.

I still cherish the same Evangelical faith, but I interpret it in, I think, far broader terms than anything that I ever specifically recall hearing expounded to me from the pulpit. I can't -- I can't credit that for the beliefs that I hold very strongly about the rights of human beings to be treated with equality.

Id.

361. See *id.* at 33:3–17.

3. Educational Influences

Anderson fondly describes memories of his public school education, a fact worth noting for many reasons as it relates to his sense of empathy and social justice.³⁶² Educational theorists suggest that a public school education affords children the chance to experience social, economic, and psychological realities in society.³⁶³ Although, this could easily be argued in terms of geographic and financial inequities evidenced across the entirety of the American public school system, civil rights and disability law inherently demand that children from all walks of life be afforded the chance to be educated amongst their peers.³⁶⁴ Thus, the influence of such diversity upon Anderson's public school education could explain his sensitivity and awareness.³⁶⁵

There is other research to suggest that children benefit from the guidance of strong adult role models in educational settings,³⁶⁶ and it appears that Anderson is of no exception. As Anderson dove into debate and government classes, two particular teachers demonstrated a keen interest in his intellec-

362. *Id.* at 14:12–18.

I think, in my life, teachers in the public schools became my role model. I particularly remember a Miss Vincent, who was one of my grade school teachers. And probably [why] I remember her so fondly is because she let me skip one whole grade and I went into the sixth grade without pausing from the fourth grade and going through the fifth grade.

Id.

363. See JACK L. NELSON ET AL., *CRITICAL ISSUES IN EDUCATION: DIALOGUES AND DIALECTICS* 171 (Jane E. Vaicunas 4th ed., 2000).

364. NAT'L RESEARCH COUNCIL, *EDUCATING ONE & ALL: STUDENTS WITH DISABILITIES AND STANDARDS-BASED REFORM* 3 (Lorraine M. McDonnell et. al. eds., 1997).

365. See NELSON ET AL., *supra* note 363, at 170.

366. Daniel Rose, *The Potential of Role-Model Education*, *ENCYCLOPEDIA INFORMAL EDUC.* (2004), www.infed.org/biblio/role_model_education.htm. Rose believes that:

Role model education can be seen as effective because it bridges the gap between the ideal and reality. Education becomes experiential, as students learn a little about their teachers' lives, and how they embody the values they are trying to pass on and explore. The gap between theory and practice is bridged, as ideological concepts become realities before the eyes of the students. Once they have truly understood an idea because they have seen it at first hand through teacher's expression of it in the way they conduct themselves, they are only then in a true position to judge its validity to their life, and then make the relevant lifestyle decision.

Id. Anderson's most notable role models were his debate teachers in high school and college who taught him:

[T]o be able to learn to argue both sides of the question, even though you were on the affirmative team, that if you were going to be an effective debater, you had to try to put yourself into the shoes or into the mind of the person who was taking the other side of the question in order to make the more effective counterarguments that—that should be made.

Anderson Transcript 1, *supra* note 2, at 16:10–17. Further, these educators, in part, inspired Anderson to pursue a career in public service. *Id.* at 16:1–2.

tual development and became clear influencers in his future.³⁶⁷ These mentors, as Anderson credits, gave him the opportunity to understand the complexities of vast social problems and political issues while simultaneously affording him the ability to observe empathy and servitude in action.³⁶⁸ Such experience no doubt propelled Anderson towards a career in law, which again forced him to analyze intricate social and political issues with a multifaceted lens.³⁶⁹

4. Personal Influences

It should also be noted that Anderson maintained well-established personal connections to individuals of diverse backgrounds, both in personal and professional circles.³⁷⁰ Research related to human diversity delineates the importance of exposure and suggests that individuals, who reach for opportunities to meet and associate with others of varying ethnic, racial, religious, and sexual orientations, automatically expand their ability to empathize and understand differences.³⁷¹ Anderson's desire to maintain an inclusive social network reinforces his apparent appreciation for diversity and willingness to expand his worldview beyond that which he experienced in childhood.³⁷² And, as Anderson acknowledges, the influence of his wife throughout the marital relationship increased his awareness and appreciation for the effects of gender inequity and his subsequent professional actions related to the issue.³⁷³

367. *Id.* at 14:12–13, 15:1–4.

368. *Id.* at 15:13–18, 16:1–6.

369. *Id.* at 15:25–16:4, 16:10–16.

370. See Anderson Transcript I, *supra* note 2, at 171:15–20. In particular, Anderson was very fond of Representative John Conyers Jr. See *id.* at 172:6–9. Anderson remembers Conyers coming over to him after Anderson's swinging vote on the Housing Act. *Id.* at 26:11–13, 27:24–28:3. Conyers "came striding over from the Democratic side of the aisle and shook hands and embraced [him] and thanked [Anderson] for the help that [he] had given." *Id.* Anderson considers Conyers as emblematic "of the restlessness of minorities in this country, at how slow we have been to gradually progress toward the goal of equal rights, of true equality, regardless of race and color and background and national origin." *Id.* at 171:15–20. In addition, Conyers, according to Anderson, represents "the hope of the future." Anderson Transcript I, *supra* note 2, at 172:6–7; see *supra* note 104 and accompanying text (for further reading regarding Congressman Conyers).

371. KARLA KROGSRUD MILEY, MICHAEL O'MELIA & BRENDA DUBOIS, *GENERALIST SOCIAL WORK PRACTICE: AN EMPOWERING APPROACH* 67 (3d ed. 2001).

372. Anderson Transcript I, *supra* note 2, at 56:16–21, 171:15–20.

373. *Id.* at 135:13–136:11. Anderson describes his wife as "a wonderful partner in whatever I did." *Id.* at 54:2–3. According to Anderson, not only was she without objections to Anderson's involvement in public life, "she thoroughly approved" of and enjoyed politics as much as he did. *Id.* at 54:12–15. Though she had "an independent mind of her own," both

Clearly, Anderson appears deeply aligned with moral values foundational to a sense of social justice and empathy.³⁷⁴ In retracing his life, it is possible to weave social, psychological, and biological theories into an argument for why Anderson would so passionately and consistently advocate for those with whom he has little in common.³⁷⁵ Yet, simply maintaining a sense of social justice would not have been enough to produce the impact Anderson had in political and professional domains given his status as an insider.³⁷⁶ Arguably, Anderson's success as a civil rights advocate, attorney, and politician, required the coupling of social justice ideals with pragmatic practices in order for him to maneuver through such highly-charged political landmines while staying grounded in a model of civic professionalism.³⁷⁷

V. CONCLUSION

The clarity and consistency of Anderson's commitment to social justice and his pragmatic approach to politics affords an opportunity to consider the relevance of civic professionalism not only as an explanation for his behavior but for its potential to perpetuate social change given the saliency of human rights and equality issues related to sexual orientation, immigration, and health care, dotting the contemporary political landscape. Through whichever lens one views the life of John B. Anderson—reformist, civic professional, intellectual, prophet—one cannot escape a recurrent theme in Anderson's life, his incessant striving for something *more*. Anderson continues to seek

Anderson and his wife were "pretty much of a mind on everything from . . . gay rights to women's rights," and all the other classic issues that many couples may be divided on. *Id.* at 54:19–24.

374. See Anderson, *American Protestantism and Political Ideology*, *supra* note 144, at 155–82.

375. See JOSÉ B. ASHFORD, CRAIG WINSTON LECROY & KATHY L. LORTIE, *HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT: A MULTIDIMENSIONAL PERSPECTIVE* 3 (Jan McDearmon & Barbara Kimmel eds., Brooks/Cole Pub. Co. 1997).

376. Anderson Transcript II, *supra* note 3, at 4. Anderson recalls:

I often have told and retold the story of the young man who had come to me during that time when that legislation was brewing and before its final passage and said, he was a professional person, a person of color, but he could not locate a home that anyone was willing to rent to him or sell to him in the section of the city where he really wanted to live and to bring up his family because of his color. And that resonated with me from the moment he told me that story through the events that led to the Open Housing Act in 1968. So yes, I do think that this deeper ethic, [this] humanistic ethic, that [has been] described [as] civic professionalism was an important element in fashioning my political career. . . . [A]nd so I think it gave me the inner satisfaction of knowing that even though I'd failed in the one attempt I've described, that nevertheless I had, for my own sake, done the things and followed the path that I thought was best.

Id.

377. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 274, at xix; see also Harrison, *supra* note 306, at 77–78.

social justice and voting reform, never wavering in his lifelong commitment to a higher ideal. It is rare that such a compassionate scholar, having been born an insider, would consciously live for the voiceless and create an existence centered around improving those who have neither the means nor the ability to help themselves. Anderson has etched a place in history as an avant-guard politician and independent thinker whose ideas continue to shape our ever-changing future. Time will only serve to establish, and further validate, the visionary that is John B. Anderson.

THE POOR AS A SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE: AN OPEN CONSTITUTIONAL QUESTION

HENRY ROSE*

(ABSTRACT)

Both judges and legal scholars assert that the United States Supreme Court has held that the poor are neither a quasi-suspect nor a suspect class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They further assert that this issue was decided by the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

It is the thesis of this article that the Supreme Court has not yet decided whether the poor are a quasi-suspect or a suspect class under Equal Protection. In fact, the majority in *San Antonio Independent School District v. Rodriguez* found that the case involved no discrete discrimination against the poor. Whether the poor should constitute a quasi-suspect or suspect class under Equal Protection remains an open constitutional question.

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I. INTRODUCTION

It is now blackletter law, taught to thousands of American law students, that the poor are neither a quasi-suspect nor a suspect class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹ The United States Supreme Court has stated that the poor are not a suspect class: “for this Court has held repeatedly that poverty, standing alone, is not a suspect classification.”²

It is the thesis of this article that the issue of whether the poor are a suspect or quasi-suspect class under traditional Equal Protection jurisprudence has not been decided by the Supreme Court. In fact, language in one majority opinion of the Supreme Court indicates that the poor are a suspect class and classifications based on this status should receive strict scrutiny from the courts: “And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.”³

This article will examine the Supreme Court’s suspect class analysis under the Equal Protection Clause and will explore its application to indigent persons. The primary contention of this article is that the issue of whether the poor are a quasi-suspect or suspect class under Equal Protection remains an open constitutional question.

II. DEVELOPMENT OF SUSPECT CLASS CATEGORIES IN EQUAL PROTECTION JURISPRUDENCE

The roots of the suspect class categories emerged in 1938 in what has been described as “the most famous footnote in the Court’s history”⁴—note four of *United States v. Carolene Products Co.*⁵ Reflecting on the new deference that the Supreme Court would apply to judicial review of constitutional challenges to economic regulatory legislation, Justice Stone suggested in note four of his majority opinion in *Carolene Products* that more searching

1. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 786 (3d ed. 2006). Erwin Chemerinsky, a constitutional scholar, states in his constitutional law hornbook that: “In *San Antonio School District v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.” *Id.*

2. *Harris v. McRae*, 448 U.S. 297, 323 (1980) (citations omitted).

3. *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969) (citations omitted).

4. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 209 (2007).

5. 304 U.S. 144 (1938).

judicial review should be applied to legislation that, inter alia, reflects “prejudice against discrete and insular minorities” who may be inadequately protected in the majoritarian political process.⁶

In 1944, the Supreme Court began to identify those minority groups that would be entitled to special constitutional protection.⁷ In *Korematsu v. United States*,⁸ the majority wrote that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and the “courts must subject them to the most rigid scrutiny.”⁹ Despite the heightened scrutiny, the Court in *Korematsu* went on to uphold the conviction of an American citizen of Japanese descent for violating an order of the U.S. Military excluding all persons of Japanese ancestry from any “military area” in California.¹⁰

In *Bolling v. Sharpe*,¹¹ a companion case to *Brown v. Board of Education*,¹² the Supreme Court held that the segregation of school children by race in the public schools in the District of Columbia violated the Fifth Amendment’s guarantee against unjustified discrimination.¹³ The majority in *Bolling* stated: “Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”¹⁴

The current Equal Protection test for reviewing governmental classifications on the basis of race began to develop in *McLaughlin v. Florida*¹⁵ in 1964.¹⁶ A Florida statute made it a crime for a Negro and a white person of the opposite sex who were not married to habitually share a nighttime room.¹⁷ A biracial, unmarried couple was convicted under the statute and they argued that the statute violated their Equal Protection rights under the Fourteenth Amendment.¹⁸ The majority in *McLaughlin* concluded that the statute could only be upheld “if it is necessary, and not merely rationally

6. *Id.* at 153 n.4. More searching judicial review under Equal Protection should also be applied to legislation that appears to be facially unconstitutional and legislation that restricts political processes. *Id.* at 152 n.4.

7. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

8. *Id.* at 214.

9. *Id.* at 216.

10. *Id.* at 223.

11. 347 U.S. 497 (1954).

12. 347 U.S. 483 (1954).

13. *Bolling*, 347 U.S. at 500.

14. *Id.* at 499.

15. 379 U.S. 184 (1964).

16. *Id.* at 191–92.

17. *Id.* at 186.

18. *Id.* at 187.

related, to the accomplishment of a permissible state policy.”¹⁹ The Florida statute failed to satisfy this standard and was invalidated.²⁰ Later cases announced the current Equal Protection test for racial classifications, strict scrutiny: Governmental classifications on the basis of race will only be upheld if they are justified by a compelling governmental interest and are necessary to the accomplishment of a legitimate governmental purpose.²¹ In addition to strict scrutiny being applied to classifications based on national origin and race, it has also been applied to state classifications based on alienage.²²

The Supreme Court first applied intermediate scrutiny to a quasi-suspect classification based on gender in 1976 and announced that in order for such a classification to satisfy Equal Protection it “must serve important governmental objectives and must be substantially related to . . . those objectives.”²³ Intermediate scrutiny was also applied to classifications based on illegitimacy in 1988.²⁴

Heightened scrutiny has been rejected in Equal Protection challenges to classifications based on age²⁵ and mental retardation.²⁶ These classifications were subjected to minimal scrutiny—the classifications “must be rationally related to a legitimate government purpose” in order to withstand an Equal Protection challenge.²⁷

III. POVERTY AND EQUAL PROTECTION

A. *Criminal Law Context*

In *Edwards v. California*,²⁸ the Supreme Court, in 1941, invalidated a California statute that made it a crime to transport non-resident indigent persons into the state, holding that this statute was outside of the state’s police power and was an unconstitutional barrier to interstate commerce.²⁹ In his concurrence, Justice Jackson opined that a state could limit persons from

19. *Id.* at 196.

20. *McLaughlin*, 379 U.S. at 196.

21. *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (quoting *McLaughlin*, 379 U.S. at 196).

22. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

23. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

24. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

25. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976).

26. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

27. *Id.* at 446; *see Murgia*, 427 U.S. at 315.

28. 314 U.S. 160 (1941).

29. *Id.* at 173.

entering the state if, for example, they were fugitives from justice or were carrying a contagion.³⁰ However, he further opined that indigence was not a legitimate reason to bar a person's entry into a state.³¹ "The mere state of being without funds is a neutral fact—constitutionally an irrelevance like race, creed, or color."³² Justice Jackson was the first Supreme Court justice to suggest the equivalent constitutional status of classifications based on poverty and race.³³

The Supreme Court first addressed the relationship between poverty and Equal Protection in *Griffin v. Illinois*³⁴ in 1956.³⁵ *Griffin* involved indigent persons in Illinois who had been convicted of armed robbery, but who could not pursue an appeal of their convictions because they could not afford to pay for the mandatory trial transcript.³⁶ The Supreme Court held that it violated Equal Protection to deny an appeal of a criminal conviction to an indigent person who could not afford a transcript, stating "In criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color."³⁷

Similarly, the Supreme Court held in 1963 in *Douglas v. California*³⁸ that it violated Equal Protection for a state to deny counsel to indigent criminal defendants in the appeals of their convictions.³⁹ The Court in *Douglas* found that, like *Griffin*, the "evil" that offended Equal Protection was the same: "discrimination against the indigent."⁴⁰

Finding Equal Protection violations in situations where states offered fewer procedural protections to indigent criminal defendants does not necessarily apply with equal force to non-criminal matters. The Supreme Court has stated that the *Griffin* and *Douglas* holdings are limited to criminal cases because they involve a government monopoly on prosecution in which participation of defendants is compelled, and they "do not extend to legislative classifications generally."⁴¹ Moreover, the Supreme Court has not applied suspect class analysis or the tri-levels of scrutiny—strict scrutiny, interme-

30. *Id.* at 184 (Jackson, J., concurring).

31. *Id.*

32. *Id.* at 184–85.

33. *See Edwards*, 314 U.S. at 185 (Jackson, J., concurring).

34. 351 U.S. 12 (1956).

35. *Id.* at 12.

36. *Id.*

37. *Id.* at 17.

38. 372 U.S. 353 (1963).

39. *Id.* at 357–58.

40. *Id.* at 355.

41. *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977).

diate scrutiny, or minimal scrutiny—in its application of Equal Protection to cases like *Griffin* and *Douglas* that arise in the criminal procedure context.

B. Civil Law Context

1. Pre-Rodriguez Cases

The significance of poverty in an Equal Protection case outside of the criminal law context was first addressed by the Supreme Court in 1966 in *Harper v. Virginia Board of Elections*.⁴² In *Harper*, Virginia residents challenged the constitutionality of a \$1.50 poll tax on Virginia residents, the payment of which was a precondition to voting in state elections.⁴³ The majority in *Harper* found that a state's interest in this area is limited to the power to determine the qualifications of voters.⁴⁴ However, as to wealth as a voter qualification, the Court stated, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."⁴⁵ The Court went on to hold that the payment of a fee as a condition of voting in a state election violated the Equal Protection Clause.⁴⁶ *Harper* suggested that classifications on the basis of wealth, like classifications on the basis of race, should receive heightened scrutiny under Equal Protection.⁴⁷ However, *Harper* also involved a factor that independently leads to heightened scrutiny, an infringement of a fundamental interest: the right to vote in state elections.⁴⁸ Consequently, the strict scrutiny analysis in *Harper* does not rest exclusively on the indigent status of the plaintiffs, but was also triggered by their fundamental interest in being able to vote in state elections.⁴⁹

The Supreme Court again commented on the role of indigency in Equal Protection analysis in 1969 in *McDonald v. Board of Election Commissioners*.⁵⁰ *McDonald* involved an Equal Protection challenge to Illinois' failure to allow incarcerated criminal defendants who were awaiting trial to participate in elections as absentee voters.⁵¹ In assessing whether the state policy of

42. 383 U.S. 663 (1966).

43. *Id.* at 664 & n.1.

44. *Id.* at 668.

45. *Id.* (citation omitted).

46. *Id.*

47. *Harper*, 383 U.S. at 668.

48. *See id.* at 670.

49. *Id.* at 668.

50. 394 U.S. 802 (1969).

51. *Id.* at 803, 806.

not allowing inmates to vote absentee must be justified by a compelling state interest, the majority stated: "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."⁵² The Court in *McDonald* concluded that the limitations in Illinois' absentee voting procedures were "not drawn on the basis of wealth or race"⁵³ and rejected the Equal Protection challenge to them.⁵⁴ However, the clear implication of the majority opinion in *McDonald* was that if the plaintiffs' inability to participate in absentee voting had been based on their poverty, the Illinois' scheme would have faced strict scrutiny under Equal Protection.⁵⁵

In *Boddie v. Connecticut*,⁵⁶ the Supreme Court in 1971 held that filing fees in divorce cases, as they were applied to low income persons who could not afford to pay them, violated the Due Process Clause of the Fourteenth Amendment.⁵⁷ In his concurring opinion, Justice Douglas asserted that the poor are a suspect class and the filing fees, as applied to them, violated Equal Protection.⁵⁸

In 1971, the Supreme Court in *James v. Valtierra*⁵⁹ upheld the constitutionality of a California requirement that all low income housing projects be approved by public referendum.⁶⁰ In a dissenting opinion in *James*, Justices Brennan, Blackmun, and Marshall asserted that the poor were a suspect class under the Equal Protection Clause.⁶¹ Significantly, the Solicitor General of the United States⁶² also argued, in his Amicus Curiae Memorandum in *James*, that classifications on the basis of wealth are suspect.⁶³ The majority

52. *Id.* at 807 (citation omitted).

53. *Id.*

54. *Id.* at 810.

55. *McDonald*, 394 U.S. at 807.

56. 401 U.S. 371 (1971).

57. *Id.* at 372, 383.

58. *See id.* at 385–86 (Douglas, J., concurring).

59. 402 U.S. 137 (1971).

60. *Id.* at 142–43.

61. *Id.* at 144–45 (Marshall, J., dissenting).

62. *See id.* at 145. *See generally* Memorandum for the United States et al. as Amicus Curiae, *James v. Valtierra*, 402 U.S. 137 (1971) (No. 154) [hereinafter Amicus Curiae Memorandum]. The Solicitor General who appeared as Amicus Curiae in *James* was Erwin Griswold, who was appointed Solicitor General by President Lyndon Johnson. Dep't of Justice, Office of the Solicitor General, <http://www.justice.gov/osg/aboutosg/griswolderwinbio.htm> (last visited Feb. 21, 2010).

63. Amicus Curiae Memorandum, *supra* note 62, at 15; *see also James*, 402 U.S. at 145 (Marshall, J., dissenting).

opinion in *James* did not address whether the poor are a suspect class under Equal Protection.⁶⁴

Also in 1971, the systems by which both California and Minnesota fund elementary and secondary public schools were found to violate Equal Protection by the Supreme Court of California and a federal district court respectively.⁶⁵ In both cases, the Courts relied, *inter alia*, on Supreme Court precedent to hold that the poor were a suspect class and the school funding systems, in disadvantaging poor students, did not withstand strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁶⁶

In *Bullock v. Carter*,⁶⁷ several persons were not allowed to run in Texas county primary elections because they could not afford to pay election filing fees required by state law.⁶⁸ These persons challenged the mandatory filing fees on Equal Protection grounds.⁶⁹ A unanimous Supreme Court found, in 1972, that since the filing fees likely impact voting rights—by limiting the pool of candidates—and the impact is related to the financial resources of voters, the filing fees would be subjected to strict scrutiny.⁷⁰ The Court held that the filing fees violated Equal Protection because they were not necessary to achieve the State's legitimate objectives in running efficient primary elections.⁷¹ The Court concluded that critical to its finding of constitutional invalidity is that "Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice."⁷²

2. *San Antonio Independent School District v. Rodriguez*

In 1971, in *Rodriguez v. San Antonio Independent School District*,⁷³ the Texas system of funding public elementary and secondary schools was found

64. See *James*, 402 U.S. at 145 (Marshall, J., dissenting).

65. *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971); *Serrano v. Priest*, 487 P.2d 1241, 1263 (Cal. 1971), *superseded by statute*, CAL. CONST. art. 1, § 31 (2009), *as recognized in* *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 104 (Ct. App. 2002). In *Serrano* the Supreme Court of California only found that the California system violated Equal Protection based on the allegations presented by the plaintiff and remanded the case to the trial court for final judgment. *Serrano*, 487 P.2d at 1263, 1266.

66. *Van Dusartz*, 334 F. Supp. at 875–76; *Serrano*, 487 P.2d at 1250, 1263, 1265.

67. 405 U.S. 134 (1972).

68. *Id.* at 135–36.

69. See *id.* at 136.

70. See *id.* at 144 (Justices Powell and Rehnquist did not take part in the decision).

71. See *id.* at 147.

72. *Bullock*, 405 U.S. at 149.

73. 337 F. Supp. 280 (W.D. Tex. 1971) (*per curiam*), *rev'd*, 411 U.S. 1 (1973).

by a three-judge district court to violate the Equal Protection Clause of the Fourteenth Amendment because, *inter alia*, it disadvantaged students from indigent families.⁷⁴ The three-judge court's per curiam opinion found that wealth classifications, as well as the fundamental interest in education, each necessitated that Texas justify its funding system by demonstrating that a compelling state interest supported it; a test that Texas failed to meet.⁷⁵ A year later, the Supreme Court accepted Texas' appeal from the decision of the three-judge district court.⁷⁶

The Supreme Court's majority opinion in *San Antonio Independent School District v. Rodriguez*⁷⁷ initially found that the Texas system for funding public elementary and secondary education results in "substantial interdistrict disparities in school expenditures" and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation."⁷⁸ The Court also noted that "Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications."⁷⁹ The Court further stated that the judgment of the district court should be affirmed if "the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."⁸⁰

In determining whether it should apply strict scrutiny in its review of the Texas school funding system, the Court conducted a lengthy yet ultimately inconclusive analysis of whether the poor constitute a suspect class under Equal Protection.⁸¹ The Court described the district court's finding of wealth discrimination as based on "a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth."⁸² The Court further stated that certain "threshold questions" were largely ignored by the district court and must be analyzed more closely here: What is the constitutional significance "that the

74. *See id.* at 281, 285–86.

75. *Id.* at 283, 285–86.

76. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 406 U.S. 966, 966 (1972), *prob. juris. noted*, 337 F. Supp. 280 (W.D. Tex. 1971).

77. 411 U.S. 1 (1973).

78. *Id.* at 15–16.

79. *Id.* at 16 (internal footnotes omitted).

80. *Id.* at 17.

81. *See id.* at 15–18.

82. *Rodriguez*, 411 U.S. at 19.

class of disadvantaged 'poor' cannot be identified or defined in customary Equal Protection terms?"⁸³ What is the constitutional significance of "the relative—rather than absolute—nature of the [alleged] deprivation"?⁸⁴

The Court found that the district court provided "no definitive description of the classifying facts or . . . disfavored class."⁸⁵ The Court opined that the disfavored class could possibly include at least three groups: (1) "persons whose incomes fall below some identifiable level of poverty," (2) persons who are disadvantaged due to a correlation between lower family income and lower educational expenditures on their behalf, and (3) all persons who, regardless of income, live in school districts with lower property valuations.⁸⁶ The Court then sought to compare each of these three possible classes to the two distinguishing characteristics of persons who prior decisions of the Court have found to be victims of unconstitutional wealth discrimination: persons who were "unable to pay for [a] desired benefit, and as a consequence, they sustained an absolute deprivation of" the benefit.⁸⁷

As to the first possible description of the disadvantaged class—persons whose income falls below an identifiable level of poverty—the Court found that "neither of the two distinguishing characteristics of wealth classifications" apply.⁸⁸ First, the plaintiffs offered no evidence that the Texas school funding system "discriminates against any definable category of 'poor' people."⁸⁹ Second, plaintiffs failed to establish that any disadvantaged class experienced an absolute deprivation since all students were receiving a public education, even if educational expenditures varied by school district.⁹⁰ Moreover, plaintiffs offered no proof that refuted the assertion of Texas that its school funding system provided an adequate education to all children, regardless of their school district.⁹¹ The Court concluded that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."⁹²

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 19–20 & n.50.

87. *Rodriguez*, 411 U.S. at 20–21.

88. *Id.* at 22.

89. *Id.* at 25.

90. *Id.* at 23–24.

91. *Id.* at 24.

92. *Rodriguez*, 411 U.S. at 24. The Court, in footnote 57 of its majority opinion, cited four prior Supreme Court decisions for the proposition that, as to wealth, Equal Protection does not require absolute equality. *Id.* at 24 & n.57. Illustrative of these decisions is *Draper v. Washington*, 372 U.S. 487 (1963), in which the Supreme Court stated that although an indigent person who is convicted of a crime is entitled to a free record on appeal, the record need not be a verbatim transcript of all trial court proceedings that could be purchased by a

The second possible description of the disadvantaged class is those persons who experience relative discrimination because the Texas school funding system resulted in a correlation between lower family income levels and lower educational expenditures.⁹³ However, the Court concluded that the plaintiffs failed to prove the existence of such a correlation.⁹⁴

The third possible description of the disadvantaged class is based on district wealth discrimination, i.e. persons, regardless of income, who live in school districts with lower property valuations.⁹⁵ The Court found that the evidence presented below did establish a correlation between lower district property valuations and lower educational expenditures, “without regard to the individual income characteristics of [the] district[s] residents.”⁹⁶ The Court described the students in the school districts with the lower property values as “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”⁹⁷ The Court also asserted that this third class had “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁹⁸ The Court concluded its analysis of the suspect class issue by stating that “the Texas system does not operate to the peculiar disadvantage of any suspect class.”⁹⁹

The Court further held that education is not a fundamental right under the Constitution and, therefore, strict scrutiny of the Texas school funding system was not required.¹⁰⁰ Finally, the Court concluded that the Texas school funding system, with a commitment to adequate funding for all students, is rationally related to a legitimate state interest and, therefore, satisfies the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹

As to whether the poor are a suspect class under Equal Protection, the majority in *Rodriguez* made several key findings. First, they found that there

non-indigent person but rather a lesser record that is adequate and effective at presenting the issues on appeal is constitutionally acceptable. *Draper*, 372 U.S. at 495–96. For example, if the defendant is only attacking the validity of the underlying criminal statute, no transcript need be provided by the state. *See id.*

93. *Rodriguez*, 411 U.S. at 25.

94. *See id.* at 27.

95. *Id.* at 27–28.

96. *Id.* at 27.

97. *Id.* at 28.

98. *Rodriguez*, 411 U.S. at 28.

99. *Id.*

100. *See id.* at 35–37.

101. *Id.* at 54–55.

was no evidence that the Texas school funding system discriminated against the poor in any discrete way.¹⁰² Second, they found that the group that was disadvantaged by the Texas school funding system was the students living in school districts with lower property values and these students shared no common income characteristics.¹⁰³ Finally, they found that this latter disadvantaged group did not possess the characteristics of a suspect class under Equal Protection.¹⁰⁴ Thus, the issue of whether the poor are or are not a suspect class under Equal Protection was not answered by the majority in *Rodriguez*. Nevertheless, the *Rodriguez* holding on the suspect class issue took on a mythical life of its own in future Supreme Court decisions.

3. Medicaid Abortion Prohibition Cases

Medicaid is a joint federal-state program that provides health insurance to low-income persons.¹⁰⁵ In 1975, Connecticut promulgated a regulation that limited Medicaid reimbursement “for first trimester abortions to those that are ‘medically necessary.’”¹⁰⁶ Two indigent women who were unable to obtain Medicaid-reimbursed abortions in Connecticut challenged the state’s imposition of the medically necessary limitation on, *inter alia*, Equal Protection grounds,¹⁰⁷ and their case reached the Supreme Court in *Maher v. Roe*.¹⁰⁸ The Supreme Court recognized in *Maher* that if the limitation operated to the disadvantage of a suspect class it would require strict judicial scrutiny.¹⁰⁹ The Court also recognized that the Connecticut limitation denied the indigent a medical service based on a wealth classification.¹¹⁰ However, the Court concluded that this case involved no discrimination against a suspect class because “this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”¹¹¹ Thus, the Court in *Maher* concluded that the poor are not a suspect class because the Supreme Court has not previously recognized them to be a suspect class.¹¹² While the

102. *Id.* at 25.

103. *Rodriguez*, 411 U.S. at 23, 27.

104. *Id.* at 28.

105. See 42 U.S.C. § 1396 (2006).

106. *Maher v. Roe*, 432 U.S. 464, 466 (1977) (internal footnotes omitted).

107. *Id.* at 466–67.

108. See *id.* at 464.

109. *Id.* at 470 (quoting *Rodriguez*, 411 U.S. at 17).

110. See *id.* at 471.

111. *Maher*, 432 U.S. at 470–71 (citing *Rodriguez II*, 411 U.S. at 29; *Dandridge v. Williams*, 397 U.S. 471 (1970)). The Supreme Court majority in *Dandridge* did not address whether the poor are a suspect class. See *Dandridge*, 397 U.S. at 471.

112. See *Maher*, 432 U.S. at 471.

Maher Court accurately stated that no prior Supreme Court decision had found the poor to be a suspect class,¹¹³ it does not follow that the obverse is true, i.e. that this history means the poor are not a suspect class. Rather, it simply means that the Supreme Court had not previously decided whether the poor are a quasi-suspect or suspect class under Equal Protection.

A later Supreme Court case, *Harris v. McRae*,¹¹⁴ addressed whether the Hyde Amendment, a federal prohibition on Medicaid reimbursement for abortions unless the mother's life is threatened by the pregnancy or the conception resulted from incest or rape, violates Equal Protection.¹¹⁵ The Court in *Harris* acknowledged that "the principal impact of the Hyde Amendment" fell on the indigent.¹¹⁶ However, the Court relied on *Maher* to conclude that limitations on Medicaid-funded abortions affect no suspect class of indigent persons.¹¹⁷ The *Harris* Court went further to state that "this Court has held repeatedly that poverty, standing alone, is not a suspect classification."¹¹⁸ Thus, the Supreme Court inaccurately asserted in *Harris* that it had consistently found that the poor are not a suspect class.¹¹⁹ In fact, none of its prior decisions had so held.

4. Status of the Poor Under Equal Protection

The creation of quasi-suspect and suspect classes in Equal Protection jurisprudence is based on a judicial recognition that certain groups have suffered historical discrimination under American law and need special constitutional protection from the majoritarian political processes that may continue to disfavor them.¹²⁰ As a result, any government classifications that disadvantage these groups and are challenged on Equal Protection grounds will receive heightened scrutiny from the courts to ensure that the classifications are carefully drawn to achieve important governmental objectives.¹²¹

113. *Id.*

114. 448 U.S. 297 (1980).

115. *Id.* at 301–02.

116. *Id.* at 323.

117. *Id.*

118. *Id.* (citing *James v. Valtierra*, 402 U.S. 137, 145 (1971)). The Supreme Court majority in *James* did not address whether the poor are a suspect class.

119. See *Harris*, 448 U.S. at 323. In a later Equal Protection case, the Supreme Court cited *Harris* for the proposition that state statutes should not be subjected to strict scrutiny even if they affect the poor and the wealthy differently. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988).

120. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–45 (1985).

121. See *id.*

The courts will consider several factors in determining whether a particular group should be treated as a quasi-suspect or suspect class under Equal Protection.¹²² These factors include: whether there are legitimate reasons for the government to treat members of the group differently than other persons; whether members of the group have immutable characteristics; whether federal and state legislation reflects a continuing antipathy or prejudice against the group; whether the group is politically powerless in its ability to attract the attention of lawmakers; and whether there are principled ways to distinguish the group from other similar groups who might seek heightened scrutiny under Equal Protection.¹²³ The Supreme Court has never applied these factors to the consideration of whether the poor as a group are or are not a suspect class under Equal Protection.

The treatment of the poor under the Equal Protection Clause has been uneven.¹²⁴ In the context of criminal prosecution, it is now well established that to deny the poor basic procedural protections because of their inability to pay for them violates Equal Protection.¹²⁵ In the civil context, the Supreme Court has offered dicta indicating that classifications based on wealth, like those based on race, involve suspect classifications that should trigger strict scrutiny.¹²⁶ However, the Supreme Court has never directly so held.¹²⁷

In *San Antonio Independent School District v. Rodriguez*,¹²⁸ the issue of the poor as a suspect class was considered by the Supreme Court.¹²⁹ However, the Court majority found that the plaintiffs failed to establish any discrimination against the poor as a group.¹³⁰ Moreover, they found that the plaintiffs in *Rodriguez* only established a single correlation between lower district property values and lower educational expenditures.¹³¹ The Court further found that the group who was disadvantaged as a result of this correlation was “a large, diverse, and amorphous class, [who was] unified only by the

122. *See id.*

123. *Id.* In *City of Cleburne*, the Supreme Court rejected quasi-suspect or suspect class status for the mentally retarded. *Id.*

124. *See Douglas v. California*, 372 U.S. 353, 357–58 (1963); *Griffin v. Illinois*, 351 U.S. 12, 17–20 (1956).

125. *See Douglas*, 372 U.S. at 357–58; *Griffin*, 351 U.S. at 17–18.

126. *Harris v. McRae*, 448 U.S. 297, 323 (1980); *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969).

127. The Supreme Court’s best opportunity to decide whether the poor are a quasi-suspect or suspect class under Equal Protection arose in *James v. Valtierra*, but the majority did not address the issue. *See James v. Valtierra*, 402 U.S. 137, 143–45 (1971) (Marshall, J., dissenting).

128. 411 U.S. 1 (1973).

129. *Id.* at 17–18.

130. *Id.* at 22.

131. *Id.* at 25–27.

common factor of residence in districts that happen[ed] to have less taxable wealth than other districts” and that this group did not share any common income characteristics.¹³² The Court concluded that this indistinct class that shared no common income characteristics had “none of the traditional indicia of suspectness.”¹³³ Accordingly, the Court concluded that the “Texas system does not operate to the peculiar disadvantage of any suspect class.”¹³⁴ Despite the narrowness of the Court’s holding on the suspect class issue in *Rodriguez*, the case has been cited inappropriately for the broad proposition that the poor are not a suspect class under the Equal Protection Clause.¹³⁵

The Supreme Court’s holding in *Rodriguez* on the suspect class issue can only fairly be described as the Court finding that the plaintiffs failed to establish that the poor as a group were disadvantaged by the way that Texas funded its schools.¹³⁶ The Supreme Court in *Rodriguez* did not address whether poor persons as a group have any of the traditional indicia of suspectness¹³⁷—e.g., whether they have been subjected to a history of purposeful unequal treatment or have been relegated to a position of political powerlessness—that would trigger strict scrutiny. *Rodriguez* did not decide whether the poor as a group are a quasi-suspect or suspect class under the Equal Protection Clause.

The issue of whether the poor are a quasi-suspect or a suspect class under Equal Protection has not yet been decided by the United States Supreme Court. To properly decide this issue, the Court would need to carefully assess whether the indicia of suspectness apply to the poor in America.¹³⁸ Until such an assessment is done by the Supreme Court, the status of the poor under the Equal Protection Clause of the Fourteenth Amendment remains an open constitutional question.

132. *Id.* at 28.

133. *Rodriguez*, 411 U.S. at 28.

134. *Id.*

135. *See* *Maier v. Roe*, 432 U.S. 464, 470–71 (1977).

136. *Rodriguez*, 411 U.S. at 28.

137. *Id.*

138. *Id.* The best example of the Supreme Court’s application of the “indicia of suspectness” to a particular group occurred in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442–46 (1985). In *City of Cleburne*, the Court held that the mentally retarded constituted neither a quasi-suspect nor a suspect class. *Id.*

DEAN ME: THE CHECKERBOARD WORLD OF LAW SCHOOL ADMINISTRATION

A PLAY IN FIVE ACTS

CAROL A. ROEHRENBECK*
GAIL LEVIN RICHMOND**

PROLOGUE¹

No matter how they felt about law school when they were students, graduates' perspective is likely to improve as time passes. Such is the case for members of the Avon Law School Class of 1958, who had returned for their fiftieth reunion.² The school has provided some excellent refreshments, and the classmates mingle and share stories from yesteryear. Our heroes, Ford Sr. and Hart Sr., reminisce about their years at the school and how proud they are that their sons both attended Avon Law in the 1970s. After saying hello to yet another person named "Dean," they steal away from their colleagues to revisit the law school and the library. We join them as they wander through the hallowed halls.

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1. A few years ago, the authors noticed an increase in the number of assistant and associate dean titles used at many law schools. They had used Ford Jr. and Hart Jr. on two previous occasions, involving library subject-area alcoves and rescuing a clueless faculty member from bad teaching evaluations. Because Ford Jr. and Hart Jr. were too busy practicing law to help this time, the authors decided to enlist Ford Sr. and Hart Sr. Fortunately, their fiftieth law school reunion was at hand and they could obtain much of the data without raising the suspicions of the deans and other administrators. See Research Methodology *infra* for specifics of the research and a list of the Association of American Law Schools' charter member schools on which this study focuses. Unless a reference indicates otherwise, data discussed in this article covers only the charter member schools.

2. The faculty members and administrators in this play previously appeared in earlier "histories" of the fictional Avon Law School. See Carol A. Roehrenbeck & Gail Levin Richmond, *Three Researchers in Search of an Alcove: A Play in Six Acts*, 84 LAW LIBR. J. 13, 14 (1992) [hereinafter *Three Researchers*]; see also Gail Levin Richmond & Carol A. Roehrenbeck, *From Tedious to Trendy: A Tax Teacher's Triumph*, 17 NOVA L. REV. 739, 739-40 (1993).

CAST OF CHARACTERS

(IN ORDER OF APPEARANCE)

HART SR.: a member of the Class of 1958³

FORD SR.: another member of the Class of 1958⁴

AMANDA BONNER: Associate Dean for Career Services⁵

MARIAN PAROO: law librarian⁶

MICHAEL LIGHTCAP: the dean⁷

JOHN LINDSAY: a law professor⁸

ATTICUS FINCH: Associate Dean for Academic Affairs⁹

Other assistant and associate deans too numerous to list

ACT 1: OUTSIDE THE RECEPTION AREA

HART SR.: I needed to take a short break from the group. I'm so confused by the names, and I don't want to insult anyone. Every other law school employee I've met tonight has the same first name—Dean. My head is spinning. In our day we had good, solid names and lots of variety—Milton,

3. Father of Hart Jr. See JOHN J. OSBORN, JR., *THE PAPER CHASE* 52–54 (1971), in which Ford and Hart broke into Langdell Hall at approximately 5:00 a.m. Once inside, they proceeded into the stacks, remaining long enough to avoid an encounter with Professor Kingsfield. *Id.* In the movie version, they entered the red set room in the library in search of class notes belonging to Professor Kingsfield. See *THE PAPER CHASE* (CBS/Fox Video 1973).

4. Father of Ford Jr. See OSBORN, *supra* note 3, at 52–53.

5. Sometime after her appearance in *Three Researchers*, *supra* note 2, Professor Amanda Bonner joined the administration. Her character is named after the defense attorney portrayed by Katherine Hepburn in *ADAM'S RIB* (Loew's, Inc. 1949).

6. Professor Paroo joined the Avon Law School faculty after leaving River City, Iowa, to attend law school. Unfortunately, this facet of her history was omitted from the stage (1957) and motion picture (1962) versions of *The Music Man*. See *THE MUSIC MAN* (Warner Brothers 1962) (starring Shirley Jones as Marian); MEREDITH WILSON, *THE MUSIC MAN* (1957).

7. Dean Lightcap has not followed the trend of shorter deanships. He was Avon's dean when *Three Researchers*, *supra* note 2, was written, and he has no plans to "retire" to the faculty. He is the namesake of the law professor played by Ronald Coleman in *THE TALK OF THE TOWN* (Columbia 1942).

8. Professor Lindsay, who also appeared in *Three Researchers*, *supra* note 2, has never been an administrator. In this regard, he is a rarity at Avon Law School. When portrayed by Edward G. Robinson in *I AM THE LAW* (Columbia Pictures Corp. 1938), he served as a special prosecutor.

9. After *TO KILL A MOCKINGBIRD* (Brentwood Productions 1962) appeared, Finch left the practice of law and became a professor at Avon Law School. Since his appearance in *Three Researchers*, *supra* note 2, he has become Associate Dean for Academic Affairs.

Benjamin, or Arthur, for example. These people's parents seem to have been fixated on the name "Dean." Perhaps they all hoped that their children would become deans at some university. How embarrassing for all of them to have ended up here at the same school. I bet the students get confused with all these folks named "Dean" running around.¹⁰ (Hart and Ford enjoy a good laugh.)

FORD SR.: You certainly are right. Maybe there was someone famous with that name twenty-five or thirty years ago. Was there a famous Dean other than Dean Martin, Dean Acheson, or John Dean that would explain how the name came into vogue? Perhaps those parents should have followed our path—I can't imagine Ford Jr. being named "Dean."

HART SR.: We should go ask someone.

FORD SR.: Maybe we should wait, Hart. One of those chaps named "Dean" said there would be a tour after dinner. Why don't we ask him about the name thing and find out when the tour will be held.

HART SR.: Don't worry. Nobody will notice that we aren't at the reception. Say, what is this office?

FORD SR.: It says "Career Services."

HART SR.: Maybe it's for undergraduates—to encourage them to attend law school.

FORD SR.: Oh look, the place is run by somebody *else* named "Dean," Dean Bonner. Let's ask that woman if he is in. Maybe we can resolve this name thing right now.

BONNER: Can I help you two? You look lost.

HART SR.: We want to talk to Dean Bonner.

BONNER: I'm Dean Bonner.

FORD SR.: Uh, no we want the gentleman named Dean Bonner.

10. When our protagonists entered law school in the mid-1950s, the average number of law school deans and other administrators was 2.5. See *infra* Appendix, Chart A (using the average for 1955). The administrative team in most law schools consisted of a dean, a librarian, and sometimes an assistant dean. (Empirical data is available in the offices of the authors.) The regional average for the Midwest was 2.4, the Northeast was 3.1, and the West Coast was 2.5. See *infra* Appendix, Chart C.

- Bonner: I *am* Dean Bonner—Dean Amanda Bonner. What can I do for you?
- Hart Sr.: Uh, excuse us. We're confused. We keep meeting people called "Dean." We met the dean of the law school so we know that these other folks aren't the "Dean," but we're trying to figure out why so many parents named their kids "Dean." When we attended school, there was only one dean and he was a he.¹¹
- Bonner: Well, I think things may have changed a bit since you attended law school. Here at Avon we have ten deans, both male and female, and that is not unusual.¹²
- Ford Sr.: You mean all those folks are deans at the school?
- Bonner: Yes—the dean and nine assistant or associate deans.
- Ford Sr.: Well what do they all do?
- Ford Sr.: And why would they put a dean from the undergraduate school in the law school? Is the university trying to talk undergraduates into a law career? Don't they know they want to be lawyers by the time they get here?
- Bonner: (Somewhat annoyed) What are you talking about?
- Hart Sr.: He means why do they have this career office here? Surely it can't be for law students. They should already know they want a career in law.
- Bonner: (Still annoyed) Today Career Services does much more than place students in jobs. We help law students in many ways,

11. By the time our protagonists attended law school the expansion in administrators was just beginning. See James M. Peden, *The History of Law School Administration*, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 1105, 1116–17 (Steve L. Sheppard ed., 1999). For example, in 1916, the Harvard Law School administration consisted of Dean Roscoe Pound and an administrative staff of two; in 1923, Columbia's trustees voted to create the position of Assistant to the Dean. *Id.* at 1116. By the time Hart Sr. and Ford Sr. completed their first year of law school, Michigan had both an associate and an assistant dean, and Rutgers Law School had a dean, an assistant dean, and an associate professor who also served as librarian. See *id.* at 1117; ASS'N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS: 1956, at 28, 110 (1955).

12. In 2005, the average number of administrators in our sample was 10. See *infra* Appendix, Chart A. The regional averages were Midwest 9.75, Northeast 13.27, and West Coast 9. See *infra* Appendix, Chart C.

including resume writing, practicing interviews, and finding the position that best advances their legal career path.¹³

Hart Sr.: Ford, I think we need to let Dean Bonner get back to work. We should rejoin our group.

Ford Sr.: Thank you, Dean Bonner.

Outside in the hallway, Hart and Ford confer.

Ford Sr.: I knew we shouldn't have left the group. Now we've offended Dean Bonner.

Hart Sr.: Ford, keep quiet for a minute. We know the law school had only one dean and a librarian when we were students. They ran the place. I can't believe there are ten deans now.

Ford Sr.: Well most are assistant or associate deans according to Dean Bonner.

Hart Sr.: Do you remember how many deans were there when our sons were in law school?¹⁴

Ford Sr.: The only thing my son had to say about law school was something about some tough professor named Kingsfield. He and your son almost got caught breaking into the library looking for notes before an exam.¹⁵

Hart Sr.: This deserves some research. Let's go to the library and see if we can find the law school yearbooks.

Ford Sr.: Oh dear, this brings back memories, not all of them good. Do you think Marian Paroo is still around?¹⁶ Maybe she could help us.

13. The use of "career services" instead of "placement" was not limited to law schools. Between 1975 and 1997, the majority of [four-year] institutions changed the name of their career planning and placement function from 'placement' to 'career services,' reflecting the broader mission and expanded programs and services. In 1997, 88 percent of career services offices were centralized units and 78 percent reported to student affairs, with 15 percent reporting to academic affairs.

R. Samuel Ratcliffe, Use of the CAS Standards by Career Services Directors at Four-Year Public Colleges and Universities 11 (July 14, 2004) (unpublished Ph.D. Dissertation, Virginia Polytechnic Institute and State University), *available at* <http://scholar.lib.vt.edu/theses/available/etd-07262004-150008/unrestricted/RatcliffeDiss.pdf>.

14. The average number of administrators in 1975, the year after our protagonists' sons graduated, was 4.77. *See infra* Appendix, Chart A.

15. *See* OSBORN, *supra* note 3, at 52–53.

16. *See supra* note 6 and accompanying text.

ACT 2: MARIAN PAROO'S OFFICE

Act 2 occurs simultaneously with Act 1. Marian Paroo is alone in her office, packing up her files. She is retiring after sixty years at Avon Law School, a fact that will be announced to the alums at the reunion dinner the next evening. Dean Lightcap plans to use the announcement as a fundraising springboard, to endow the Marian Paroo Professorship. Dean Lightcap enters.

Lightcap: Marian, why aren't you at the reunion party? The alums are eager to talk to you. After all, you've been at Avon Law longer than any other faculty member.

Paroo: I'll be up in a minute. I was going through these files and simply lost track of time. Is there anything in particular you need?

Lightcap: Actually, I've come to give you some wonderful news. President Stodgy has approved your promotion to Associate Dean for Library & Technology.¹⁷

Paroo: I didn't know I was being considered for an associate dean title. After all, I'm retiring in two months. If I've managed without the title for sixty years, what is the point of having it for eight weeks?

Lightcap: Well, that is the problem. Although you never asked for the title, it appears that librarians want the same titles as the administrators in career services, admissions, student affairs, graduate programs, academic affairs, clinical and externship programs, academic support, development, and budget. The person to whom I've offered your position won't accept it

17. The use of titles incorporating more than the word "librarian" to refer to the library director begins to appear in 1996. See *infra* Appendix, Chart F. Early titles include Associate Dean for Library and Computer Service (Columbia), Associate Dean (Northwestern), and Dean for Information Resources (Washington University). ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 1996–1997, at 115, 163 (1996). By the year 2005, ten schools in the charter group had *AALS Directory* listings that included information, computers, or associate or assistant dean in their library director titles. See ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 2005–2006, at 29 (2005). The use of the associate or assistant dean title also appears in other publications or resources. See, e.g., Carol Bredemeyer, *What Do Directors Do?*, 96 LAW LIBR. J. 317, 318–19 (2004). For example, in an article published in 2004, Carol Bredemeyer reported, "Today, nearly 40% of the responding directors have responsibility for all law school technology. Many have had assistant or associate dean added to their title . . ." *Id.* at 318 (internal footnotes omitted).

unless I make her an associate dean. And I knew getting another title through President Stodgy would be easier if it was for you—President Stodgy really appreciates all the free research your staff has provided the university and the library space you’ve given up for university storage.

Paroo: But doesn’t he know I’m retiring at the end of the semester?

Lightcap: Details, details, details. He’s such a busy person, and I hate to bother him with the day-to-day operations of the law school.

Paroo: I take it that he doesn’t know.

Lightcap: In any event, the maintenance workers are putting a new nameplate on your door at this very moment. Congratulations, Marian.

Lightcap leaves a few minutes before Ford Sr. and Hart Sr. arrive.

ACT 3: MARIAN PAROO’S OFFICE

When Ford Sr. and Hart Sr. arrive at Marian Paroo’s office a few minutes later, they do not notice the nameplate on the door. They knock and enter when she says, “Come in.”

Ford Sr.: Professor Paroo, it’s so good to see you after all these years. We’re back for the reunion and wanted to stop and say hello.

Hart Sr.: And we need your help figuring out what has happened to our law school.

Paroo: Gentlemen, what are you talking about? It’s the same law school it’s always been. Avon Law School doesn’t chase after fads the way some other schools do. The curriculum is virtually the same as it was when you were students.¹⁸ We even have some of the original tables in the library. And, although we’ve added some modern gadgets, like computers for students to use for what we call online legal research,

18. *But cf.* ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA 6 (2004) (“It has been a decade of dynamism in legal education. From the first year required curriculum through upper division electives, law schools have revised the configuration of courses, increased emphasis in skills and professionalism, and added opportunities in electives, specializations and other degree granting offerings.”). As Professor Paroo noted, Avon Law School has not followed this trend.

you'll notice the books are all still in place. Of course I also have some helpers—librarians who perform online legal research and teach research classes.¹⁹

Ford Sr.: That may be, but what about all these dean people? We weren't in the building more than fifteen minutes before we met at least five of them. At first we thought their first names were Dean—a frightful lack of imagination by their parents—but then Dean Bonner in Career Services informed us it was a title and that the law school had nine assistant and associate deans. Can this be true? When we were students, there was only one dean, good old Dean Diditall.²⁰

Hart Sr.: Exactly—the school seems to have deans in charge of every function, even functions I've never heard of. Dean Diditall and his secretary ran everything—admitted us, got us jobs, and asked us to give money. You ran the library. Why does Avon need anything else? Does the school really have NINE assistant and associate deans?

Paroo: Well, I must admit I get a bit confused about who I should go to for different things. If you ask me I'd say, "Less is more, but"

Ford Sr.: That's a relief. Perhaps that Bonner person really is named Dean and didn't want to admit her parents lacked imagination.

Paroo: No, Amanda really is an associate dean. She was more easy-going when she was a young faculty member. Satisfying the job aspirations of law students is probably less enjoyable than being a full-time faculty member.

Ford Sr.: But how many assistant and associate deans are there really?

Paroo: As of a few minutes ago, we have ten. It appears I am now an associate dean.

19. In 1955–56, the average number of librarians in the charter group was 5.17, although three schools, Harvard (reporting 17), Michigan (reporting 18), and Yale (reporting 20), reported numbers well above those reported by the other schools that reported to the American Association of Law Libraries (AALL). See *infra* Appendix, Chart E. In 1955–56, the total number of librarians in the charter group was 150; by 2005 it had increased to 347. See *infra* Appendix, Chart D.

20. In 1955, the total number of administrators in the charter group was seventy-four; by 2005 it had increased to 326. See *infra* Appendix, Chart B.

- Hart Sr.: I'm sure we're delighted for you, but we still don't understand why the school needs so many titles. Can you help us out here? You were always so good to us when we were students. In fact, our sons have fond memories of sitting in the library doing their homework while we attended class. Law school life was challenging for returning veterans and their families, but you were always so gracious. I'm sure you were an important factor in their decision to attend Avon Law.
- Paroo: It was my pleasure. Now I don't want to keep you from your reunion. Meet me for breakfast tomorrow morning, and I'll explain everything. How is eight a.m. at the Campus Diner?
- Ford Sr.: We'll see you then.

ACT 4: THE CAMPUS DINER

Paroo, Hart Sr., and Ford Sr. sit around a table and enjoy breakfast.

- Paroo: Gentlemen, let me take you back in time. When you graduated in 1958, law schools were relatively small and uncomplicated.²¹ We admitted almost all of our applicants, told them to look to their left and right because one-third of them wouldn't survive the first year, and taught them in large classes using the Socratic Method. When a student graduated, he²² went home and joined a local firm or hung out a shingle. The dean, his secretary, and the library director could handle most tasks on their own or with a bit of help from the central university.²³

21. Total J.D. enrollment reported by 127 American Bar Association-approved law schools for the 1955–56 academic year was 33,405. Memorandum from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, on Women Enrollment: First Year, J.D., Total to the Deans of ABA Approved Law Schs. (Apr. 16, 1997) (on file with the authors) [hereinafter Memorandum from James P. White]. The average law school thus had an enrollment of 263 J.D. candidates. *See id.* The total number of J.D. students in the charter group was 11,600. *See infra* Appendix, Chart G.

22. Total enrollment of women in 1955–56 was 1234. Memorandum from James P. White, *supra* note 21. This constituted slightly less than four percent of total J.D. enrollment. *Id.*

23. In 1957, the AALS reported that fifty-two schools had a library staff of one person. ASS'N OF AM. LAW SCH., ANATOMY OF MODERN LEGAL EDUCATION 445 (1961).

Over time, accreditation standards and government regulation increased the number of services law schools provide. And, given ABA Standards regarding qualified students,²⁴ the look to the left and right method no longer worked. Schools needed to hire staff to review applications and select among applicants. As tuition increased, financial aid became increasingly important. The focus on career services, bar passage, academic support, disability services, pro bono opportunities, etc., required additional staffing—and not merely at the clerical level.²⁵ And, because deans were constantly on the road raising money, they no longer had time to run the day-to-day law school operations. The increase in administrative staffing had begun by the time your sons attended Avon.²⁶ And, while law schools were becoming more complex, they were also increasing in size. Many law schools added additional J.D. students.²⁷ Others added LL.M. or non-law master's degree students. Many did both.

24. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 38 (2009), Standard 501(b) [hereinafter STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS] (“A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.”).

25. “A law school shall provide all its students . . . with basic student services, including maintenance of accurate student records, academic advising and counseling, financial aid counseling, and an active career counseling service to assist students in making sound career choices and obtaining employment.” *Id.* at 43, Standard 511. “A law school shall provide the academic support necessary to assure each student a satisfactory opportunity to complete the program, graduate, and become a member of the legal profession. This obligation may require a school to create and maintain a formal academic support program.” *Id.* at 24, Interpretation 303-3.

26. From 1916 to the mid 1950s, law schools experienced a second wave of adding administrators. Peden, *supra* note 11, at 1117. For example, in 1956, the University of Michigan added its first associate and assistant deans. *Id.*; see also Jeffrey Brainard, Paul Fain & Kathryn Masterson, *Support-Staff Jobs Double in 20 Years, Outpacing Enrollment*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 24, 2009, at A1 (looking at universities generally rather than at specific departments).

27. As illustrated in Appendix, Chart H, fall semester J.D. enrollment at American Bar Association-approved schools increased significantly from 1995 through 2005. See *infra* Appendix, Chart H. Data for 1955 through 1995 appear in the White Memorandum. See Memorandum from James P. White, *supra* note 21. Data for 2000 appears in the Morgan Memorandum. See Memorandum from Rick L. Morgan, Data Specialist, on Fall 2000 Law School Enrollment in ABA-Approved Law Schools to the Deans of ABA-Approved Law Sch. (Apr. 5, 2001) (on file with the authors). Data for 2005 appears in the Rosenlieb Memorandum. See Memorandum from David Rosenlieb, Data Specialist, on Fall 2005 Law

And then there are all the questionnaires. Sometimes it seems that all I do is answer questionnaires. The ABA collects mountains of data every year. Then along come *U.S. News*, *Peterson's*, *Princeton Review*, *NALP*, and others I can't even remember. And that is just the tip of the iceberg. Because the university is regionally accredited, it must submit significant amounts of data.²⁸ Law school administrators have to respond to those requests. Faculty members can't be bothered with those requests; they want to focus on teaching, scholarship, and community service. Non-faculty administrators can be hired—or terminated—more easily; and some of them add to the curriculum by teaching on an adjunct basis.²⁹

Hart Sr.: OK. I understand why you need more administrators. But why must they all be called “Dean”?

School Enrollment in ABA-Approved Law Schools to the Deans of ABA-Approved Law Sch. (Feb. 10, 2006) (on file with the authors). The 2005 data covered 191 law schools, yielding an average J.D. enrollment of 737 students. (Note that 2004 data is used for Tulane and Loyola-New Orleans, which were forced to suspend operations after Hurricane Katrina in 2005.). Within the charter group, J.D. enrollment increased from 11,600 in 1995 to 23,537 in 2005. See *infra* Appendix, Chart G. The increase in Chart H is more dramatic than that in Chart G because Chart H reflects an increase in the number of law schools during that period. The American Bar Association Section of Legal Education and Admissions to the Bar website currently provides enrollment and graduation data for the 1963–64 through 2008–09 academic years. See ABA, Enrollment and Degrees Awarded 1963–2008, available at <http://www.abanet.org/legaled/statistics/charts/stats-1.pdf>. By 2008–09, there were 200 accredited law schools (including provisionally approved schools) and a total of 142,922 students enrolled in J.D. programs. *Id.*

28. See STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 24, at 4, Interpretation 101-1.

29. See *id.* at 32. The American Bar Association computes student/faculty ratio using a formula found in Standards and Rules of Procedure for Approval of Law Schools. *Id.* Interpretation 402-1 counts full-time faculty members on tenure track or its equivalent as “full” faculty members if they don’t have significant administrative duties; those who have significant administrative duties count for less (.5 each). See *id.* at 32–33. Other percentages apply to full-time clinicians and legal writing instructors who are not on tenure track or its equivalent (.7 each) and to adjuncts, emeriti, and administrators who are not on tenure track or its equivalent (.2 each). *Id.* at 33. For purposes of computing the ratio, the additional resources represented by individuals in the .7, .5, and .2 categories cannot exceed twenty percent of the count of “full” faculty members. *Id.* at 32. A proposal to delete Interpretation 402-1 is pending. See Memorandum from Hulett H. Askew, Consultant on Legal Educ., and Richard J. Morgan, Chair, Standards Review Comm., on Proposed Deletion of Interpretations 402-1 and 402-2 of the ABA *Standards for the Approval of Law Schools* to Interested Pers. & Entities (Aug. 2008), available at [http://www.abanet.org/legaled/committees/StandardsReviewdocuments/N & C 402-1.DOC](http://www.abanet.org/legaled/committees/StandardsReviewdocuments/N%20C%20402-1.DOC).

Paroo: That is a very interesting question, and it has a variety of answers. One explanation relates to reporting hierarchies. Each new reporting level requires a new title. Once an office has used assistant director, associate director, and director, assistant or associate dean is the next step. Another explanation involves salary levels. A university might attach a maximum salary to a particular title; at some point, a better title is the dean's only way to justify a higher compensation level. A third possible explanation relates to respect. Some university vice presidents treat deans, including associate and assistant deans, better than they do directors. Faculty members are more likely to be civil to an assistant dean than to a director. Students today may hesitate at calling a dean by his or first name; we aren't sure they will do so for directors, coordinators, or other titles that would not normally be used in conversation.

Ford Sr.: You mean students actually call you Marian? We would never have done that.

Paroo: There are those who do. I wonder if that practice will end now that I have this exalted associate dean title.

Although I don't know why, my successor refused to accept this position without the title change. I was surprised to hear that. So after you left last night, I did some research into librarian titles. Although most of the Association of American Law Schools (AALS) charter members continue to use the director title,³⁰ I was surprised to learn that many library directors have become assistant or associate deans. Apparently, I'm the tail end of a trend rather than its vanguard.

By the way, please act surprised tonight when Dean Lightcap announces my retirement.

30. See *infra* Appendix, Chart F; ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 2009–2010 (2009) [hereinafter AALS DIRECTORY 2009–2010]. The AALS *Directory* released in fall 2009 showed that seven of the thirty charter schools (Drake, George Washington, Minnesota, NYU, Ohio State, Syracuse, and Washington University) included dean titles in describing their library directors. Harvard used a dean title on its website but indicated only “director” in the *Directory*; Northwestern used a dean title on its website (in addition to a separate director) but did not include the dean in its *Directory* listing. See *id.*

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John Lindsay and Atticus Finch emerge from a booth at the back of the Campus Diner. They are engaged in a heated discussion and don't notice Paroo, Hart Sr., and Ford Sr.

Paroo: Gentlemen, what is causing so much angst? You appear not to have noticed us at all. Let me introduce you to two alums from the class of 1958, Hart Sr. and Ford Sr. You may have taught their sons, Hart Jr. and Ford Jr.

Lindsay: I'm glad to make your acquaintance. I assume you are back for reunion weekend.

Finch: It's my pleasure to welcome you back. Now that I am the associate dean for academic affairs, I don't teach as many students as I used to. I do seem to recall teaching your sons when I was a young faculty member. I hope all is well with them.

Paroo: Please join us for coffee and let us know what you were debating a few minutes ago.

Lindsay: Sorry, Marian, but we got carried away discussing Dean Lightcap's five-year plan. I appear to be the odd man out around here. From my perspective, the plan amounts to empire building. I'll admit he'll raise a significant amount of money, and we really do need a building addition. But I'd hoped for new classrooms and faculty offices. The blueprints seem to call for more administrative offices, and that probably means yet another gaggle of assistant and associate deans. Finch, here, went over to the "dean" side awhile ago. He can't wait to add publications and human resources offices, separate alumni from development, and establish a faculty development office within academic affairs.

Paroo: John, it can't be as one-sided as that. Perhaps the classrooms and faculty offices are on the upper floors.

Lindsay: Unfortunately not. The upper floors will be student apartments, which I grant are a good idea, even though it means adding yet another administrator—an assistant dean for facilities management. No wonder we all wear name badges—it's the only way to recognize all these non-faculty administrators.

- Finch: John, I know I'll never convince you, but Avon is behind the curve on this issue. Dean Lightcap did his research before proposing the five-year plan. These new titles, and others we aren't proposing, already exist at other law schools. I'm sure Marian can verify this. In fact, many of her fellow library directors have become assistant and associate deans.
- Lindsay: I know I'm "just" a law professor, but that doesn't mean I'm ignorant. I don't think you'll ever convince me all these administrators improve our school.
- Finch: "Just" a faculty member? John, you are no more "just" a faculty member than a diamond is "just" a mineral. The last time I looked you were the Major Donor Distinguished Professor of Law and Director of the Program in Applied Legal Ethics. And you are hardly alone; at least half the members of this faculty direct a program, a center, or an institute. I don't recall your declining that opportunity or complaining about any of the other faculty titles.³¹ In the end, it's all about providing service to our students. No matter how much we'd like them to be, law schools aren't one-room country schoolhouses and our students don't want them to

31. For example, in early April 2010, the website of AALS charter member Columbia University listed the following titles for faculty administrators who are not deans: Director, European Legal Studies; Director, Center for Gender and Sexuality Law; Director of the Center for the Study of Law & Culture; Director of the Center for Chinese Legal Studies; Director, Center for Japanese Legal Studies; Co-Chair, Charles E. Gerber Transactional Studies Program; Director of Clinical Education. Columbia Law Sch., Full Time Faculty, <http://www.law.columbia.edu/faculty/full-time> (last visited Apr. 3, 2010). The website also listed several other Centers: Center for Climate Change Law; Center for Contract and Economic Organization; Center for Korean Legal Studies; Center for Institutional and Social Change; Center for Israeli Legal Studies; Center for Law & Philosophy; Center for Law and Economic Studies; Center for Public Interest Law; Center on Corporate Governance; Center on Crime, Community and Law; Center on Global Governance; Kernochan Center for Law, Media and the Arts; Vale Columbia Center on Sustainable International Investment. Columbia Law Sch., Programs, http://www.law.columbia.edu/center_program (last visited Apr. 3, 2010). Several of these other Centers listed faculty members as directors, but the faculty list *supra* did not include the director title. Columbia's administration included a dean, two vice deans, an associate dean for finance and planning, an associate dean for development and alumni relations, an assistant dean for faculty services, an assistant dean for special projects, an assistant dean for registration and financial services, a dean of admissions, a dean of career services, a dean of graduate legal studies, a dean of social justice programs, a dean of students, and a law library director. Columbia Law Sch., Administration (and links from this page), http://www.law.columbia.edu/law_school (last visited Apr. 3, 2010).

be. Let's have this conversation at the end of the five-year plan. I bet you'll see that I was right.³²

ACT 5: DEAN LIGHTCAP'S CONFERENCE ROOM

A year has passed since the reunion. Dean Lightcap has called a meeting of all of the associate and assistant deans. The recession, and resulting lack of employment opportunities for recent college graduates, has resulted in more applicants to law schools. Unfortunately, Avon Law School cannot accommodate more students—despite its need for revenue—unless it hires more faculty members. The university has cut the budget in most areas and imposed a freeze on adding additional personnel. The only way the school can hire more faculty members is by reducing its costs for non-faculty administrative personnel.

Lightcap: Friends, this is a sad day for me. You have all worked so hard for Avon Law. Your efforts are a major factor in our success. Unfortunately, we are victims of the current economic downturn. Our endowments have plummeted in value, thus reducing discretionary income; the university has cut our operating budget; and we cannot add new personnel. The only way I can add new faculty, which we sorely need to cover courses demanded by our students, is to eliminate non-faculty positions.

If you hold a tenure-line faculty position, I will either add to your administrative duties or return you to the full-time faculty. If you are a non-faculty administrator, I will be furloughing you—or the directors who report to you—for a few days each month. In some cases, I will be eliminating positions. If you have a J.D. degree and are not teaching a course, I will expect you to do so if you are retained.³³ You

32. Whether Finch is correct is the subject for another article, but the statistics demonstrate that law school administrations have expanded dramatically since 1955. See *infra* Appendix, Chart B. The number of administrators increased 341%. *Id.* The number of librarians increased 131%. See *infra* Appendix, Chart D. The number of students increased 103%. See *infra* Appendix, Chart G.

33. See Peter A. Facione, *20 Ways for Colleges to Cut Costs and Make Money*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 20, 2009, at A36. The methods the author suggests include requiring “every administrator with a master’s or doctoral degree to teach a course” and offering “employees temporary or partial leave without pay but with full benefits.” *Id.*; see also Gary A. Olson, *The Unkindest Cut of All*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct

are all such valuable contributors, and I hate to take these steps. But because faculty members generate tuition revenue, I cannot eliminate their positions while retaining non-faculty administrators. The university is establishing an out-placement office to help you find other positions. It has been an honor to work with you all.

5, 2009, at A42 (“Seek to reduce the number of administrators when possible. Administrative posts sometimes proliferate just as unnecessary programs do.”).

APPENDIX

Research Methodology

For the purpose of this study, we focused on the charter members of the Association of American Law Schools (AALS).³⁴ We collected data from the thirty schools that remained in the charter group and excluded schools that resigned or whose status was not clear.³⁵ In instances where data was not available or recorded, that fact is noted on the charts. In one case a school, Indiana University, had two locations (Bloomington and Indianapolis), separate faculties and librarians, but one administration. When separate data was available it was included in the study. We used five-year intervals and began in 1955, the year that Ford Sr. and Hart Sr. began law school.

All data for administrators was taken from what our protagonists would, in politically incorrect language, refer to as the “Stud Book” and that is today known as *The AALS Directory of Law Teachers*. To arrive at the number of administrators for any given year, we counted individuals listed as dean, associate dean, assistant dean, and librarian. We did not count other titles, including director, that begin to appear more recently because it was not clear how much, if any, administrative responsibility those titles included. If those individuals were included, the number of administrators would be

34. Charter members were determined by the “Charter Member” designation in *The AALS Directory of Law Teachers*. See AALS DIRECTORY 2009–2010, *supra* note 30. The AALS was founded in 1900 with thirty-two charter members. Ass’n Am. Law Sch., About AALS, <http://www.aals.org/about.php> (last visited Feb. 21, 2010). Professor James Bradley Thayer, Harvard Law School, was its first president. *Id.* Professor Michael H. Cardozo of Cornell University Law School became the Association’s first Executive Director in 1963 and established the Association’s national office. See *id.* From a full-time staff of two in 1963 (including the Executive Director), the AALS full-time staff has grown to approximately twenty, including the Executive Director, Deputy Director, and Associate Director. *Id.* The staff is based at the national office in Washington, D.C. See *id.*

35. Charter member schools were Boston University, California-Hastings, Western Reserve (which later became Case Western Reserve), Cincinnati, Colorado, Columbia, Cornell, Drake, George Washington, Harvard, Illinois, Indiana, Iowa, Iowa College of Law (Des Moines) (listed as Drake in 1905), Kansas, Michigan, Maine, Minnesota, Missouri, New York University, Northwestern, Ohio State, University of Pennsylvania, University of Pittsburgh, Stanford, Syracuse, Tennessee, Washington University (St. Louis), Wisconsin, and Yale. The original group of members, those who signed the Articles of Association before July 1, 1901, also included Baltimore, Buffalo, and Denver Law School. REPORT OF THE EXECUTIVE COMMITTEE OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, 1901 ANNUAL REPORT OF THE ABA 576–77. Baltimore and Buffalo resigned in 1906. REPORT OF THE EXECUTIVE COMMITTEE OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, 1906 ANNUAL REPORTS OF THE ABA 125–27. Denver is listed as a member until 1905. ASS’N OF AM. LAW SCHS., PROCEEDINGS OF THE FIFTH ANNUAL MEETING 2 (1905). We counted Indiana as two schools to reflect the two campuses. See *id.*

much higher. Because the AALS did not publish a directory during the 2008–09 academic year, we could not use that source to report on 2008 or 2009 data. Because we ended with 2005 data, the charts may not reflect changes caused by the current economic downturn or other factors.

Data for librarians was taken from the *American Association of Law Libraries (AALL) Directory*.³⁶ These numbers may differ from the numbers reported in other surveys and calculations based on other data sets or using different compilation methods. While the study generally uses five year intervals, this was not possible for the years 1965 and 1975. The *AALL Directory* was published biennially from 1964 to 1980, so we selected 1966 and 1976.³⁷ The director of the library is included in this category. The director is also counted as an administrator and appears in the numbers for law school administrators if he or she was listed in the *AALS Directory*. Titles for librarians that were the basis for the information in Chart F were taken from the AALS directories. As noted in the preceding paragraph, this information may differ from information reported in other surveys and directories. The numbers in Chart F include librarians who listed decanal titles such as assistant or associate dean and titles including computer or information resources or variations thereof.

Student enrollment numbers were taken from multiple sources. The numbers in Chart G, Total Number J.D. Students, AALS Charter Member Schools, were taken from American Bar Association statistical reports with titles that varied over the time period of the study.³⁸ The numbers in Chart H, Total Number J.D. Students, All ABA Law Schools, were taken from American Bar Association Memoranda.³⁹ Chart H is the only chart that is not restricted to charter member schools.

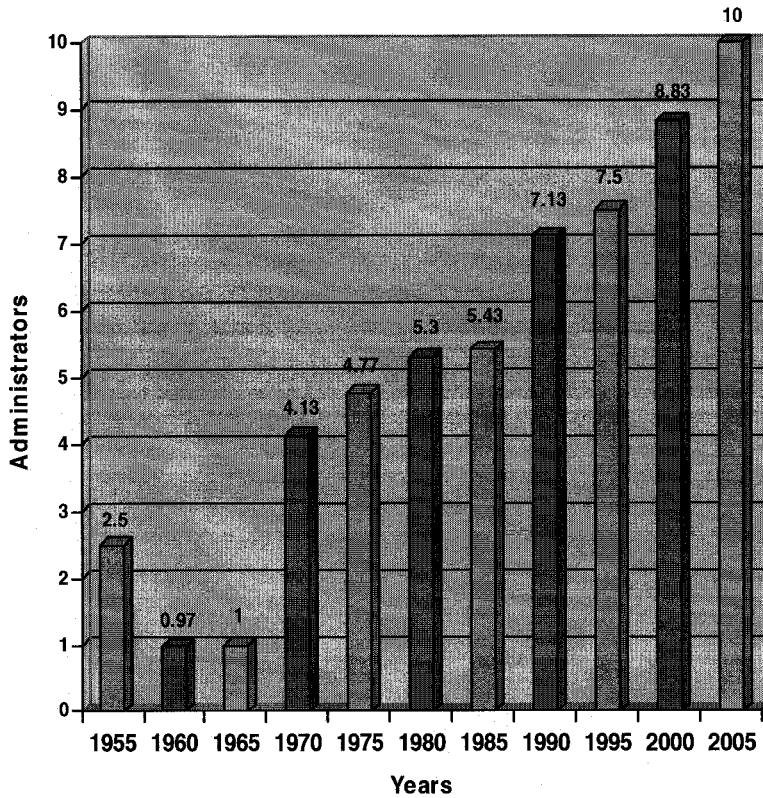
36. Title variations include LAW LIBRARIES IN THE UNITED STATES AND CANADA (1940–1962/3), DIRECTORY OF LAW LIBRARIES (1964–1987), and AALL DIRECTORY AND HANDBOOK (1987/88).

37. The data for the 1966 and 1976 Directories were based on questionnaires submitted to libraries in January of 1966 and 1976.

38. See ABA, COMPREHENSIVE LAW LIBRARY STATISTICAL TABLE; ABA, STATISTICAL SURVEY OF LAW SCHOOL LIBRARIES AND LIBRARIANS; and ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES (The Association, Chicago).

39. Memorandum from David Rosenlieb, Fall 2005 Enrollment Statistics, *supra* note 27, at 1–2.

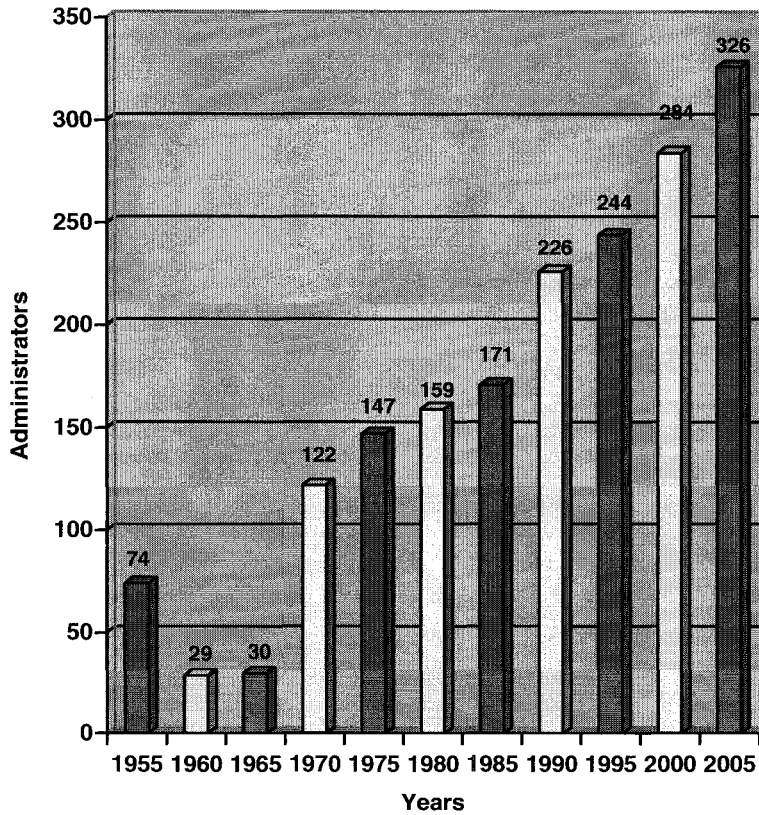
CHART A
Administrators (average)⁴⁰



40. Data from 1955, 1960, and 1965 do not include University of Maine and Indiana University-Indianapolis. Data from 1970 does not include University of Maine.

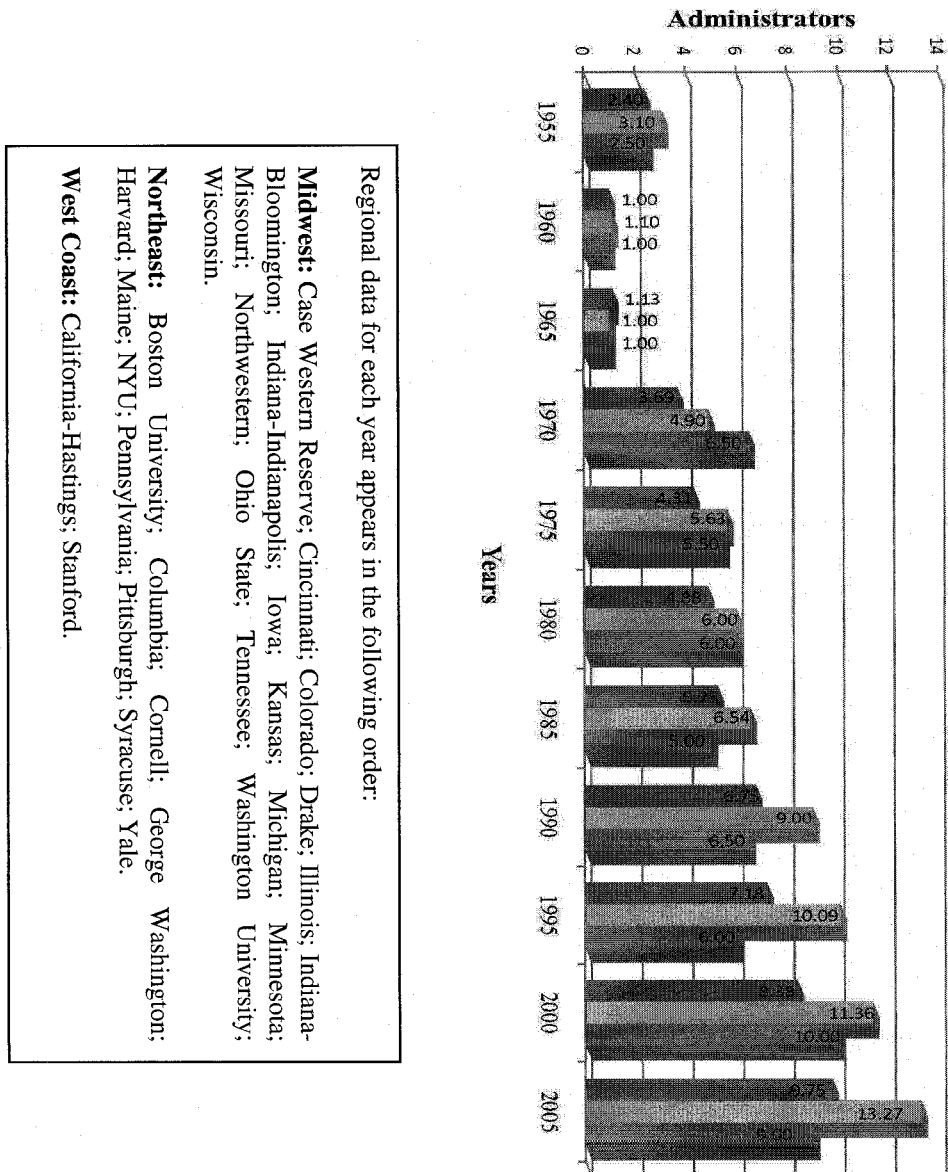
CHART B

*Administrators (total)*⁴¹



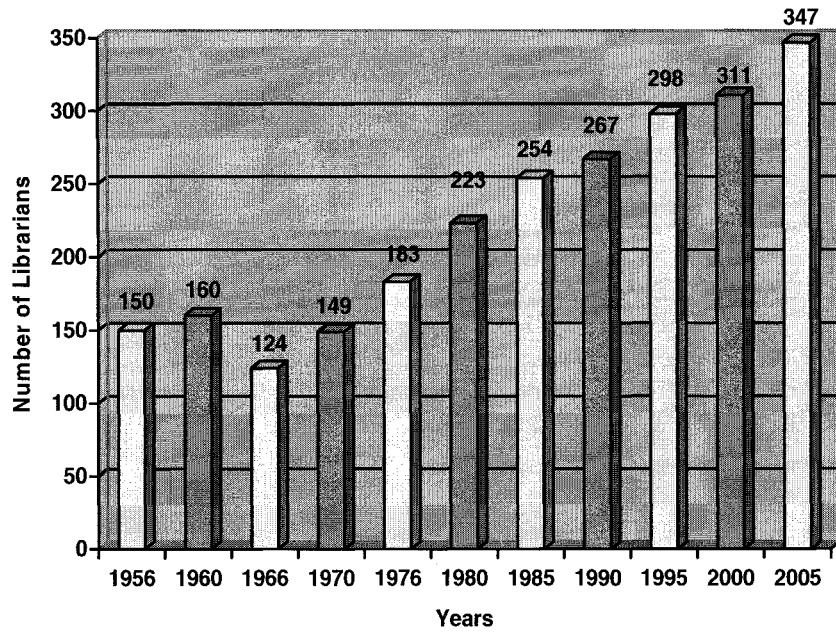
41. Data from 1955, 1960, and 1965 do not include University of Maine and Indiana University-Indianapolis. Data from 1970 does not include University of Maine.

CHART C
*Regional Average*⁴²



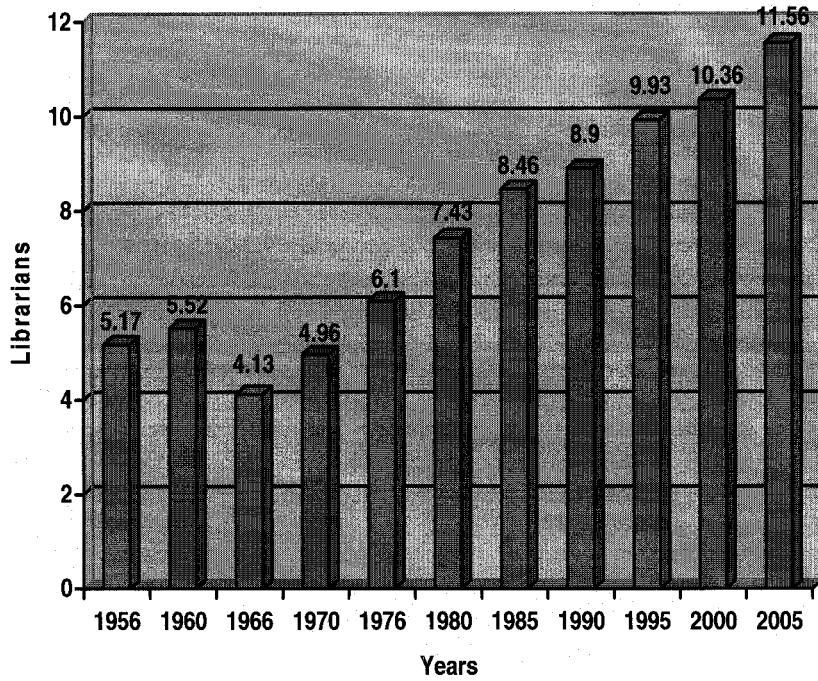
42. Data from 1955, 1960, and 1965 do not include University of Maine and Indiana University-Indianapolis. Data from 1970 does not include University of Maine.

CHART D
Librarians (total)⁴³



43. Data from 1956 and 1960 do not include University of Maine.

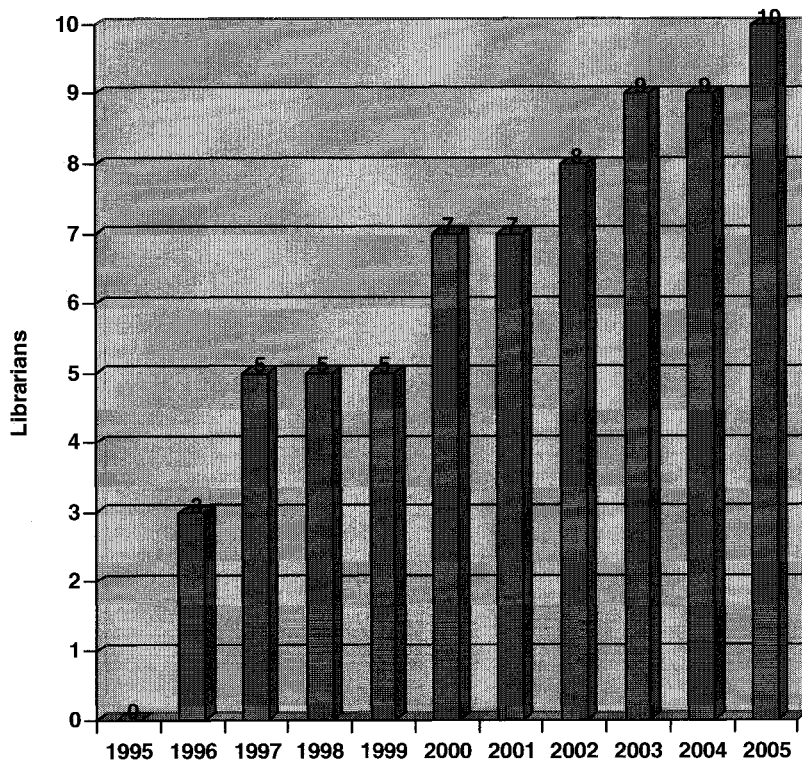
CHART E
Librarians (average)⁴⁴



44. Data from 1956 and 1960 do not include University of Maine.

CHART F

*Librarians with Administrative
and/or Information Titles (total)⁴⁵*



45. This chart includes titles such as assistant or associate dean, computer or information resources.

CHART G

*Total Number J.D. Students
AALS Charter Member Schools*

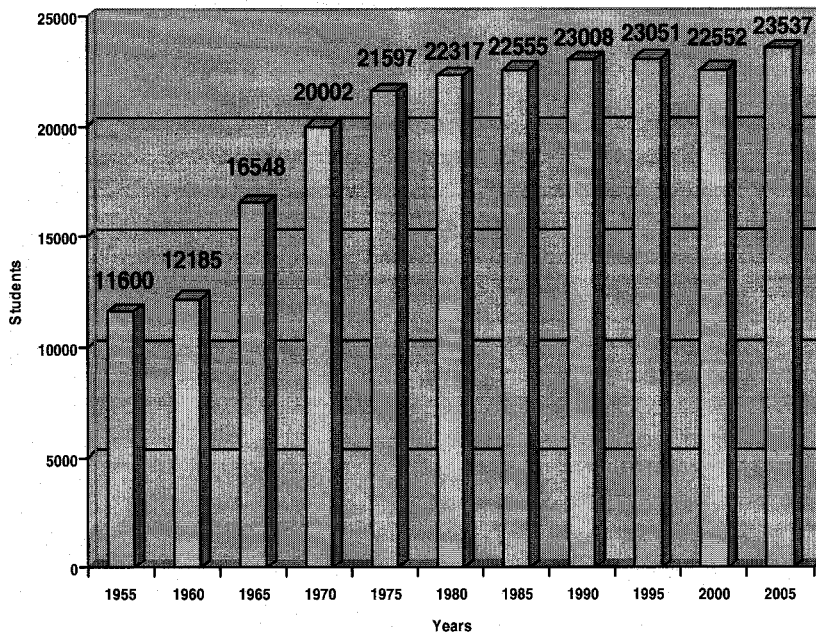
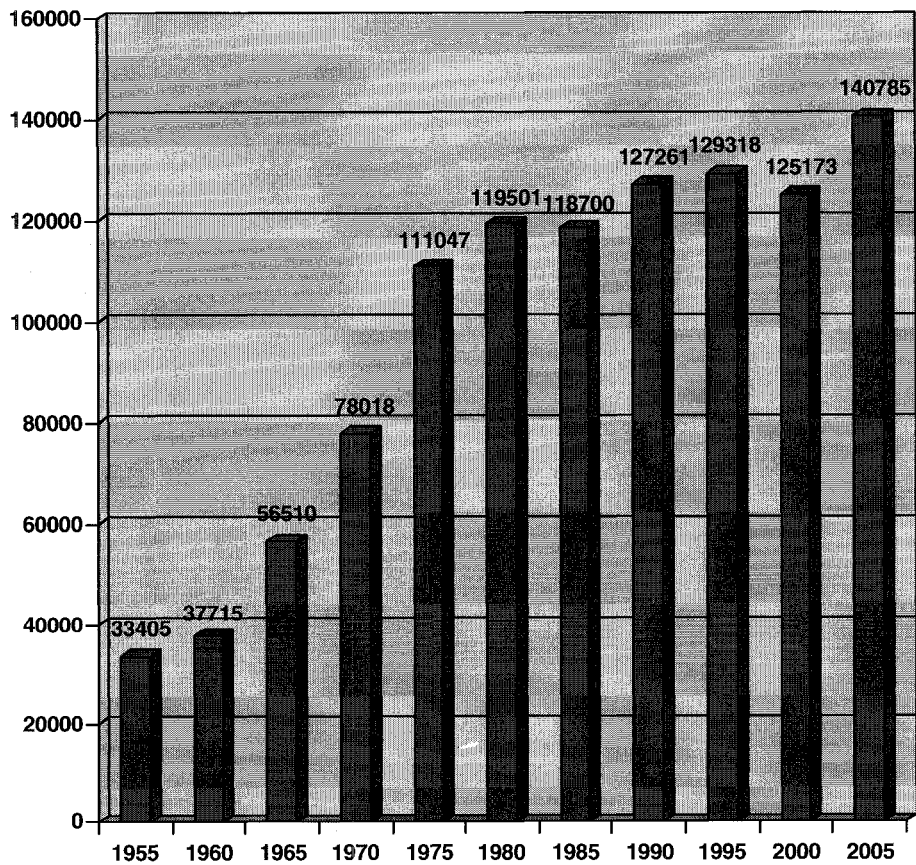


CHART H

*Total Number J.D. Students
All ABA Law Schools*



120 HOURS UNTIL THE CONSISTENT TREATMENT OF SIMULTANEOUS DEATH UNDER THE CALIFORNIA PROBATE CODE

VICTORIA J. HANEMAN
JENNIFER M. BOOTH*

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“[A] man’s dying is more the survivors’ affair than his own.”¹

Murders, plagues, accidents, tragedies, and disasters regularly claim multiple lives in one fell blow.² The issue of simultaneous death arises when

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1. THOMAS MANN, *THE MAGIC MOUNTAIN* 532 (H.T. Lowe-Porter trans., Alfred A. Knopf, Inc. 13th ed. 1963) (1927).

2. Advances in modern transportation may increase the frequency with which simultaneous deaths occur. See Stephen M. Arcuri, Note, *Does Simultaneous Really Mean Simultaneous? Interpreting the Uniform Simultaneous Death Act*, 17 QUINNIAC PROB. L.J. 338, 340–41 (2004) (noting the National Conference of Commissioners on Uniform State Laws’ recognition that “instances of simultaneous death [would increase] as a result of the advances in forms of transportation”); Richard W. Harris, *Federal Estate Tax Consequences of Common Disasters or Closely Proximate Deaths*, 47 TAX LAW. 763, 763 (1994); Keith A. Pagano,

there is insufficient evidence that two individuals died otherwise than simultaneously. Imagine, for example, a newly married couple is riding on a train. A tragic accident ensues and the train is derailed. Husband is partially decapitated, and Wife's heart is unceremoniously severed by a metal stake. The first medical expert speculates that Husband survived Wife by at least three minutes. After examining the remains, this expert believes that the partial decapitation left the spinal column intact, and blood flow continued to Husband's brain for several minutes. Conversely, the second medical expert asserts that Wife survived Husband. She believes that both Husband and Wife died immediately after receiving their injuries, but Wife's injuries were incurred later than Husband's, based upon where she was seated in the train car at time of impact. If it is resolved that Wife survived Husband, Wife's heirs will inherit Husband's assets through Wife. And if it is resolved that Husband survived Wife, Husband's heirs will inherit Wife's assets through Husband. As a result, much is at stake for the heirs apparent,³ and litigation ensues.

In the case of closely proximate deaths, the legal issue that must be resolved is the order of death. Irrebuttable prescription of a particular order of death simplifies resolution of this question of fact. Therefore, many states have adopted arbitrary time periods by which one decedent must survive the other to inherit.⁴ In California, the simultaneous death statutes are asymmetrical. As a result, the devolution of property in such cases will hinge entirely upon the type of estate plan adopted by the decedents.⁵

If the decedent dies intestate, California Probate Code (CPC) section 6403 requires clear and convincing evidence of survival by 120 hours.⁶ CPC section 6211 applies to statutory wills, and adopts the same standard.⁷ CPC section 220 is applicable to those decedents who die with a non-statutory will in place—such as a holographic will or a formally attested will.⁸ This section requires clear and convincing evidence of death, but does not adopt the 120-hour rule.⁹

Note, *Simul et Semel: Estate Planning Principles and the Uniform Simultaneous Death Act's Corresponding Tax Consequences*, 14 QUINNIPIAC PROB. L.J. 449, 449–50 (2000).

3. An heir apparent is defined as “a person who is certain to inherit unless excluded by valid will.” THE LAW DICTIONARY 195 (7th ed. 1997).

4. See Harris, *supra* note 2, at 764–65.

5. See 3 California Probate Practice, § 23.05(2)(b)(i) (LexisNexis Matthew Bender 2009).

6. CAL. PROB. CODE § 6403(a) (West 2010).

7. CAL. PROB. CODE § 6211 (West 2010).

8. See CAL. PROB. CODE § 220 (West 2010).

9. *Id.*

The same policies that prompted the California Legislature to adopt the 120-hour rule in some instances can be argued to support the 120-hour rule in other instances. A more compelling argument in favor of legislative symmetry, however, is the fact that inheritance should not turn merely upon the testamentary instrument—or lack thereof—selected by the decedent. The present inconsistency has little or no detrimental effect upon a decedent who retains counsel to draft his testamentary instruments, while the self-represented decedent is adversely affected.

This Article proposes that the 120-hour rule be codified as a default rule, applying to all instruments in lieu of a provision to the contrary. Section I considers the evolution of the California simultaneous death statutes. The inconsistencies in the California statute are considered in Section II, and weighed against a broader normative standard. Section III sets forth the proposal that the 120-hour rule be consistently adopted through the CPC as the standard default rule, and counters criticisms.

I. AN OVERVIEW OF SIMULTANEOUS DEATH¹⁰ IN CALIFORNIA

A. *Overview of Simultaneous Death*

Rapid mass transportation, natural disasters, and multiple homicides¹¹ are common situations in which a decedent and his heir apparent will perish without clear evidence as to the order of death.¹² Order of death is the question raised by the closely proximate deaths of the decedent and his heir ap-

10. The term “simultaneous death” is a misnomer, since the two individuals may not have died simultaneously. In this Article, the term is used to indicate a scenario in which the two individuals are known to have died at approximately the same time, but the order of their death is uncertain.

11. One multiple murder case occurred in Woodstock, Illinois, when Richard Church allegedly brutally beat and stabbed his former girlfriend’s parents and attacked the girlfriend and her younger brother. Marja Mills & Nancy Ryan, *New Clue in Woodstock Slayings: 2 NIU Students Report Seeing Suspect Richard Church*, CHI. TRIB., Sept. 13, 1989, at D6. The coroner’s office determined that the parents died within a minute of each other. *Id.* Due to the close proximity of their deaths, a simultaneous death issue arose as to whose heirs should get the proceeds of a \$360,000 life insurance policy. *Id.* Based on their wills, if the mother had been deemed to have survived, the money would go to her estate and the children would inherit the proceeds. *Id.* However, based on the coroner’s report, the father was deemed to have survived the mother by one minute; therefore, the proceeds were to go to his father, recently deceased. *Id.* Fortunately, the family members negotiated the disbursement of these funds and ensured the children were provided for; however, this is not always the case. Mills & Ryan, *supra*. Newspapers across the country are inundated with stories of murders and other types of incidents where multiple deaths occur within close proximity of each other.

12. Perhaps there are no surviving eyewitnesses to attest to order of death, or alternatively, the nature of the disaster or accident leaves the order of death in question.

parent. Much hinges on the answer to the question. Order of death will ultimately determine if the devolution and distribution of assets will flow from the decedent through his heir apparent, who is also now deceased, to the beneficiaries of his heir apparent—or alternatively, if inheritance will flow from the decedent directly to his heirs, bypassing the heir apparent entirely.¹³ This is significant, in that the average decedent would prefer to leave property to his heirs, rather than the beneficiaries of his heir apparent.

The order of death is a question of fact.¹⁴ Advancements in medical science and technology sometimes blur where the line should be drawn between life and death.¹⁵ Medical experts often offer contradictory opinions on the precise time of death,¹⁶ wielding sanguinary medical evidence, and fueling protracted litigation.¹⁷ When deaths occur within a short period of time,¹⁸ determination of order of death may be nothing short of speculative.¹⁹

13. See generally David Polin, *Proof of Survivorship of Common Disaster*, 56 AM. JUR. PROOF OF FACTS 3D 255, § 3 (2009).

14. David W. Meyers, *Time of Death: Medicolegal Considerations*, 16 AM. JUR. PROOF OF FACTS 2D § 11 (2008).

15. Even the definition of death remains somewhat ambiguous. Some courts have used Black's Law Dictionary's definition of death. See, e.g., *In re Estate of Schmidt*, 67 Cal. Rptr. 847, 854 (Ct. App. 1968) (holding the wife had survived her husband by ten to fifteen minutes on evidence of her moaning and breathing through the application of Black's Law Dictionary definition, which focuses on "the total stoppage of the circulation of the blood and [a] cessation of the animal and vital functions [consequent thereon] such as respiration, . . . pulsation," etc.). Other courts have resorted to signals of death which may contradict one another such as receptivity—or lack of—to painful stimuli, lack of movement or breathing for at least an hour, EEG readings, and hypothermia. See *In re Haymer*, 450 N.E.2d 940, 945 n.9 (Ill. App. Ct. 1983). When cases turn on the determination of time of death and the definition is not standard, the outcome of such cases may rest solely on the judge hearing the case. See, e.g., *Smith v. Smith*, 317 S.W.2d 275, 282 (Ark. 1958). One such case involved a husband and wife who were killed in a common accident. *Id.* at 276. The husband was dead and unresponsive to resuscitation while machines supported the wife for seventeen days. *Id.* The case turned on whether the wife had simultaneously died with the husband or whether her coma state was enough to deem that she survived him by seventeen days. See *id.* at 277. The court decided that the fact she was breathing, albeit with the assistance of machines, was sufficient to support a finding that she survived the husband. See *id.* at 276, 282.

16. Polin, *supra* note 14, § 37.

17. See Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1095 n.24, 1149 (1992).

18. As an interesting side note, two new studies have found a "bereavement effect" in which close individuals die within short periods of time of each other due to factors such as emotional attachment and shared environments, with elderly couples most at risk of simultaneous deaths. See generally Chris Emery, *Science Seeks Explanations; Shared Emotions and Environments Can Contribute to Simultaneous Deaths*, BALT. SUN, July 30, 2006, at A16.

19. See Halbach & Waggoner, *supra* note 17, at 1094 ("Too often, proof of survival, even survival by only an instant, became impossible in such cases.").

At common law, in simultaneous death scenarios, heirs were expected to prove survivorship by whatever means available.²⁰ When it was not possible to establish order of death, decedents were treated as having died at the same moment in time, and property was distributed accordingly.²¹ Upon a finding of instantaneous death, the share that would have gone to the beneficiary—now deceased—was deemed to have lapsed and either passed to those mentioned in the residuary clause of a will, or passed through intestacy to the heirs of the decedent.²² To bring efficiency to this area of the law, several state legislatures attempted to resolve order of death through the use of arbitrary presumptions.²³

Irrebuttable prescription of a particular order of death simplifies problems created by indeterminable death order, such as double administration, conflict, and litigation.²⁴ When there is insufficient evidence of order of death, approximately twenty-one states have incorporated a 120-hour survival requirement into their statutes—requiring that an heir apparent survive the decedent by 120 hours to inherit from the decedent.²⁵ California is one such state.²⁶

B. *Governing Statutes in California*

A valid will in California may come in one of three forms: An attested will, a statutory will, or a holographic will.²⁷ California has adopted a 120-hour rule for both intestacy and statutory wills.²⁸ California Probate Code section 6403 governs intestacy and provides a bright-line workable stan-

20. Harris, *supra* note 2, at 765.

21. *Id.* (citing *In re Estate of Conover*, 259 N.Y.S.2d 618, 621 (N.Y. Sup. Ct. 1965)).

22. See generally THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953).

23. Harris, *supra* note 2, at 765–66 (explaining that presumptions included “‘the younger person survives the older,’ or ‘the male survives the female,’ or that a ‘parent survives a minor child or infant’”).

24. Mark A. Lester, *Identifying and Solving Selected Problems in Probate Administration*, 15765 NAT’L BUS. INST. 47, 75 (2005).

25. Harris, *supra* note 2, at 763–64.

26. See CAL. PROB. CODE §§ 6403, 6211 (West 2010).

27. CAL. PROB. CODE § 6110 (West 2010) (attested will requirements); CAL. PROB. CODE § 6111 (West 2010) (holographic will requirements); CAL. PROB. CODE § 6200 (West 2010) (statutory will requirements); see also 14 WITKIN, SUMMARY OF CALIFORNIA LAW, WILLS AND PROBATE § 111 (10th ed. 2005) (discussing attested and holographic wills); *Id.* § 115 (discussing statutory will requirements).

28. CAL. PROB. CODE §§ 6403, 6211.

dard.²⁹ In order to take an intestate share, the deceased beneficiary's estate must show by clear and convincing evidence that the beneficiary survived the intestate decedent by at least 120 hours.³⁰ Failure to meet this time requirement results in the beneficiary being treated as predeceasing the decedent, unless the treatment would cause the property to escheat to the state.³¹ The 120-hour rule was adopted for intestacy to protect married couples with children from prior relationships who die simultaneously.³² A similar provision protects those who use statutory wills pursuant to California Probate Code section 6211, as long as specific, standard language is used in the will.³³

California Probate Code section 220 is the default rule governing simultaneous death and applies to formally attested and holographic wills.³⁴ Section 220 requires that the beneficiary show survival by clear and convincing evidence.³⁵ If order of death cannot be determined by clear and convincing evidence, section 220 prescribes that each party will be treated as if that party predeceased the other.³⁶ A beneficiary may take under the will as long as there is clear and convincing evidence of survival by one breath, as no 120-hour limitation is incorporated into this statute.³⁷ Unless the beneficiary's

29. See CAL. PROB. CODE § 6403(a) (intestacy standards); CAL. PROB. CODE § 6211 (statutory will standards).

30. CAL. PROB. CODE § 6403(a).

31. CAL. PROB. CODE § 6211.

32. See *Recommendation Relating to Simultaneous Deaths*, 17 CAL. L. REVISION COMMISSION REP. 443, 447 (1984).

33. See CAL. PROB. CODE § 6211. The 120-hour rule applies in a statutory will provided that the language contains either the phrase "if living" or who "survives me," and failure to survive will similarly cause the gift to lapse and return to the estate of the deceased testator. *Id.* The statutory will form cannot have words crossed out, and all provisions provide "survive [sic] me." CAL. PROB. CODE § 6240 (West 2010). The accompanying instructions advise:

A person must survive you by 120 hours to take a gift under this Will. If that person does not, then the gift fails and goes with the rest of your assets. If the person who does not survive you is a relative of yours or your spouse, then certain assets may go to the relative's descendants.

Id.

34. See CAL. PROB. CODE §§ 220, 6111 (West 2010).

35. CAL. PROB. CODE § 220. The clear and convincing standard has been interpreted as "clear, explicitly and unequivocal;" "so clear as to leave no substantial doubt;" and "sufficiently strong to commend the unhesitating assents of every reasonable mind." Lester, *supra* note 24, at 76 (citing *In re Angelia P.*, 623 P.2d 198 (Cal. 1981), *superseded by statute*, WELF. & INST. § 366.26, as recognized in *In re Cody W.*, 36 Cal. Rptr. 2d 848 (Ct. App. 1994) and cases cited therein).

36. CAL. PROB. CODE § 220.

37. *In re Estate of Schmidt*, 67 Cal. Rptr. 847, 852 (Ct. App. 1968) ("If the burden of proof is met, survival by one second is enough to make the statute inapplicable.") (citing *In re Estate of Di Bella*, 100 N.Y.S.2d 763, 765 (Surr. Ct. 1950)). Although it seems drastic, courts

estate can sufficiently prove survival or the will explicitly provides a contrary presumption, the testator will be presumed to have outlived the named beneficiary.³⁸ If the beneficiary's estate fails to show survival by clear and convincing evidence, the person asserting survivorship has failed to meet the burden of proof and the property lapses, returning to the testator's estate.³⁹

C. *The Model Uniform Code and the Uniform Simultaneous Death Act*

The simultaneous death provisions in the California Probate Code have been adapted from the Model Uniform Probate Code and the Uniform Simultaneous Death Act (USDA),⁴⁰ both of which are "model codes" offering uniform rules that states may adopt in whole, part, or not at all.⁴¹ The USDA was created in response to various cases in which the need to determine the order of death became apparent.⁴² To replace "the former arbitrary and complicated presumptions of survivorship with effective, workable,

have upheld survival by seconds. See *In re Estate of Rowley*, 65 Cal. Rptr. 139, 141, 143 (Ct. App. 1967) (court held that wife had survived the husband by 1/150,000 of a second and allowed her estate to take a share under the will rather than have it pass through the will's residuary clause).

38. See LAWRENCE P. KELLER, WILLS: SIMULTANEOUS DEATH STATUTORY PROVISIONS, app. K (2009).

39. Lester, *supra* note 24, at 79.

40. See Harris, *supra* note 2, at 763–64. The USDA was created in 1940 and adopted, at least in part, by forty-six states and the District of Columbia by 1994. *Id.* at 763. The Act sought to simplify the probate issues that surround cases of simultaneous death and establish the order of death in a manner consistent with most testators' intentions. See *id.*; Nancy G. Henderson, *Drafting Dispositive Provisions in Wills (Part 2)*, PRAC. LAW. July 1997 at 15, 29 [hereinafter Henderson, *Drafting Dispositive Provisions*].

41. For an overview of the adoption of the Uniform Probate code by state see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 900 (1992).

42. See, e.g., *Janus v. Tarasewicz*, 482 N.E.2d 418, 418 (Ill. App. Ct. 1985). Stanley and Theresa, husband and wife, returned from their honeymoon to find that Stanley's brother died from undetermined causes. *Id.* at 419. While the family gathered at Stanley's brother's house to mourn, both Stanley and Theresa unknowingly ingested the same Tylenol—laced with cyanide—that had been ingested by Stanley's brother. *Id.* The case centered on the determination of the order of death of Stanley and Theresa for the distribution of Stanley's life insurance policy, which named his wife as the primary beneficiary and his mother as the contingent beneficiary. *Id.* In disregard of Stanley's obvious intent, the court ultimately found that Theresa had survived Stanley, and the insurance proceeds flowed through her to her family. *Id.* at 424. The trial included contradictory evidence of various experts as to Theresa's survival. *Janus*, 482 N.E.2d at 423. One expert testified that after reviewing her charts, she was brain dead upon arrival to the hospital, while another contended she died several days later. *Id.* The *Janus* case brought nationwide attention to the simultaneous death problem.

and equitable rules,”⁴³ the USDA prescribes a fictitious order of death in cases where it is impossible to determine the true order.⁴⁴ In these situations, the estate passes as though each person predeceased the other.⁴⁵ For example, if a husband and wife die in a common accident and the order of death cannot be determined with sufficient evidence, the husband will be treated as predeceasing the wife for the purpose of the disposition of the wife’s estate and vice versa for the husband’s estate.⁴⁶ When this occurs, the wife’s estate no longer passes through the already deceased husband but rather passes to those next in line.⁴⁷ If there is a will, this property will pass to the next person listed as a beneficiary or named in the residuary clause.⁴⁸ In intestacy, this would mean this share of property would go to her heirs instead of passing on to his heirs.⁴⁹

The Uniform Probate Code, prior to 1990, created an arbitrary minimum requirement for survivorship of 120 hours for both wills and intestacy.⁵⁰ This requirement was adopted to protect the average decedent’s intent of passing property for the benefit and enjoyment of his heirs.⁵¹ The 120-hour rule permits the property to revert back to the decedent’s heirs if the deceased beneficiary is unable to outlive the decedent by 120 hours.⁵² This time requirement effectuates the probable intent of the decedent to pass on property to the closest or named beneficiary without adverse tax consequences, while at the same time balancing the decedent’s intent to pass property to his heirs rather than to the already deceased beneficiary’s heirs.⁵³

In 1990, the Uniform Probate Code’s 120-hour rule was incorporated into the Uniform Simultaneous Death Act, which made the 120-hour rule mandatory for intestacy pursuant to USDA section 2-104.⁵⁴ It also instituted a provision under section 2-702 for wills, life insurance policies, and joint

43. *Azvedo v. Benevolent Soc’y of Cal.*, 270 P.2d 948, 952 (Cal. App. Dep’t Super. Ct. 1954) (per curiam).

44. Harris, *supra* note 2, at 763; *see also* 14 WITKIN, *supra* note 27, § 288 (describing these situations as unresolvable).

45. *See* UNIF. SIMULTANEOUS DEATH ACT, prefatory note (1993).

46. *See* UNIF. SIMULTANEOUS DEATH ACT § 2.

47. *See* UNIF. SIMULTANEOUS DEATH ACT, prefatory note.

48. *See* UNIF. PROBATE CODE § 2-603(b)(4) (amended 2006).

49. UNIF. PROBATE CODE § 2-103 (amended 2006).

50. Halbach & Waggoner, *supra* note 17, at 1095.

51. *Id.* at 1095–96.

52. *See Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 (“Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival.”).

53. Halbach & Waggoner, *supra* note 17, at 1095–96.

54. *Id.* at 1096.

tenancies as a default when there is no provision to the contrary in the document.⁵⁵ These provisions increased the requisite standard of proof for survivorship, requiring proof of survival by 120 hours by clear and convincing evidence.⁵⁶ This 120-hour rule is extended to those who die testate or intestate under the Uniform Probate Code but can be contracted out through contrary express language in a will.⁵⁷ These changes sought to decrease litigation by statutory resolution of close calls by creating a presumption of non-survival.⁵⁸

II. THE EFFECT OF INCONSISTENT LEGISLATION IN CALIFORNIA

The 120-hour rule is not the panacea for conflict and litigation in every instance where two people die within seconds, minutes, or hours of each other, but it is an easily articulated and understood objective standard by which order of death is efficiently resolved.⁵⁹ The 120-hour rule ensures consistent and efficient estate administration, thus protecting the intent of the average testator,⁶⁰ avoiding double administration of estates,⁶¹ and decreasing litigation when the deaths occur within a short period of time.⁶² If a time requirement is inconsistently incorporated into the Code—applying to some estate plans, but not others—several of these policies are frustrated in part or in whole.⁶³

55. *Id.* at 1096 & n.28.

56. *Id.* at 1096–97. The old standard of proof was a preponderance of the evidence.

57. *Id.* at 1094 (“[S]ection 2-702, which applies to wills and other dispositive documents . . . is a rule of construction, or default rule, that yields to a contrary intention.”).

58. Halbach & Waggoner, *supra* note 17, at 1097.

59. *See Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

60. *See id.* (“Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival.”).

61. Henderson, *Drafting Dispositive Provisions*, *supra* note 40, at 30 (“The primary purpose of requiring a beneficiary to survive a certain period of time after the client’s death is to reduce the likelihood that the property will pass through two administration proceedings to reach the ultimate beneficiaries.”).

62. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

63. *See id.* at 449.

A. Holographic Wills

California is one of twenty-eight states⁶⁴ that recognize holographic wills.⁶⁵ Pursuant to California Probate Code section 6111, a holographic will is valid provided that “the signature and . . . material provisions are in the handwriting of the testator,”⁶⁶ and it was executed with the requisite testamentary intent.⁶⁷ A holographic will has very few formal requirements,⁶⁸ providing an estate planning “safe harbor” for those who are unwilling or

64. Other states that recognize holographic wills, with varying requirements, include: Alaska (ALASKA STAT. § 13.12.502(b) (2009)), Arizona (ARIZ. REV. STAT. ANN. § 14-2503 (2009)), Arkansas (ARK. CODE ANN. § 28-25-104 (2009)), Colorado (COLO. REV. STAT. § 15-11-502 (2009)), Hawaii (HAW. REV. STAT. § 560: 2-502 (2009)), Idaho (IDAHO CODE ANN. § 15-2-503 (2010)), Kentucky (KY. REV. STAT. ANN. § 394.040 (West 2009)), Louisiana (LA. CIV. CODE ANN. art. 1575 (2009)), Maine (ME. REV. STAT. ANN. tit. 18-A, § 2-503 (2009)), Maryland (MD. CODE ANN., EST. & TRUSTS § 4-103 (LexisNexis 2009)), Michigan (MICH. COMP. LAWS § 700.2502 (2009)), Mississippi (MISS. CODE ANN. § 91-5-1 (2009)), Montana (MONT. CODE ANN. § 72-2-522 (2009)), Nebraska (NEB. REV. STAT. § 30-2328 (2009)), Nevada (NEV. REV. STAT. § 133.090 (2009)), New Jersey (N.J. STAT. ANN. § 3B:3-3 (West 2009)), New York (N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 2009)), North Carolina (N.C. GEN. STAT. § 31-3.4 (2009)), North Dakota (N.D. CENT. CODE § 30.1-08-02 (2009)), Oklahoma (OKLA. STAT. tit. 84, § 54 (2009)), South Dakota (S.D. CODIFIED LAWS § 29A-2-502 (2009)), Tennessee (TENN. CODE ANN. § 32-1-105 (2009)), Texas (TEX. PROB. CODE ANN. § 60 (Vernon 2009)), Utah (UTAH CODE ANN. § 75-2-502 (2009)), Virginia (VA. CODE ANN. § 64.1-49 (2009)), West Virginia (W. VA. CODE § 41-1-3 (2009)), Wyoming (WYO. STAT. ANN. § 2-6-113 (2009)). Those states that have no statutory provision for holographic wills include: Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. See Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 & n.15 (1988). Similarly, the District of Columbia has no statutory provision for holographic wills. See *id.*

65. CAL. PROB. CODE § 6111 (West 2010). A “holographic will” is [a] will that is handwritten by the testator. Such a will is typically unattested. Holographic wills are rooted in the civil-law tradition, having originated in Roman law and having been authorized under the Napoleonic Code. French and Spanish settlers introduced holographic wills in America, primarily in the South and West. Today they are recognized in about half the states.—Also termed *olographic will*.

BLACK’S LAW DICTIONARY 1735–36 (9th ed. 2004).

66. CAL. PROB. CODE § 6111(a). Section 6111(c) allows the statement of testamentary intent to be in the testator’s handwriting or part of a commercially printed will. CAL. PROB. CODE § 6111(c). Section 6111 applies to testators who died on or after January 1, 1985. CAL. PROB. CODE § 6111 cmt.

67. See *In re Estate of Geffene*, 81 Cal. Rptr. 833, 839–40 (Ct. App. 1969) (finding that instructions to attorney for will provisions had the necessary testamentary intent to be admitted to probate). The failure to include a date will not invalidate the will unless there is an issue of testamentary capacity, or it is inconsistent with another will, and order of execution of the documents cannot be determined. CAL. PROB. CODE § 6111(b)(1)–(2).

68. Natale, *supra* note 64, at 160.

unable to satisfy the requirements of a formally attested will.⁶⁹ Holographic wills are a viable alternative for those who are unable to seek the assistance of an attorney,⁷⁰ and by and large, holographs are drafted by unrepresented testators.⁷¹ While the perceived ease of drafting these wills has some benefit, problems often arise when these wills are probated due to the lack of legal guidance.⁷² The convenience of a holographic will may not outweigh the failure of these informal instruments to adequately effectuate the testator's intent, as the drafter may not understand the legal implications of words or omissions in the document.⁷³ The problem of simultaneous death would understandably be overlooked by a layperson drafting a holographic will.⁷⁴ California Probate Code's failure to incorporate a 120-hour rule adversely impacts such a testator—and this impact results primarily from the testator's unrepresented status.⁷⁵

The unrepresented testate decedent will have likely executed either a statutory will or a holographic will. In a simultaneous death scenario, this (likely uninformed) choice will produce an inconsistent result. While the 120-hour standard will apply to a statutory will,⁷⁶ it will not apply to the holographic will.⁷⁷ In the latter circumstance, the share the testator intended for

69. *Id.* at 159–60 & n.9.

70. See Robert P. Kirk, Comment, *The New Holographic Will in California: Has It Outlived Its Usefulness?*, 20 CAL. W. L. REV. 258, 272 (1984); Kathy Kristof, *Document Your Wishes Before Tragedy Strikes*, L.A. TIMES, Apr. 17, 2005, at E3 (“You can take a cocktail napkin at a bar, write down what you want to happen to your assets and sign it, and you are set.” (quoting attorney Bill Abrams)).

71. Donald R. Travers, *Holographic Will*, in CALIFORNIA ESTATE PLANNING, HOLOGRAPHIC WILLS § 5.12 (Robert Denham et al. eds., 2008).

72. Natale, *supra* note 64, at 160.

73. See *id.* at 160 & nn.9–10 (citing *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982)).

74. See Kristof, *supra* note 70 (“Still, a form is preferable because it includes various options you may not think to include” in the holographic will, such as “how to distribute your assets if your spouse should die at the same time as you.”).

75. See *id.*

76. CAL. PROB. CODE § 6211 (West 2010). The 120-hour rule applies in a statutory will provided that the language contains either the phrase “if living” or who “survives me,” and failure to survive will similarly cause the gift to lapse and return to the estate of the deceased testator. *Id.* The statutory will form cannot have words crossed out, and all provisions of the will form include “survive [sic] me.” See CAL. PROB. CODE § 6240 (West 2010). The accompanying instructions advise,

[a] person must survive you by 120 hours to take a gift under this Will. If that person does not, then the gift fails and goes with the rest of your assets. If the person who does not survive you is a relative of yours or your spouse, then certain assets may go to the relative's descendants.

Id.

77. See CAL. PROB. CODE § 6211 (West 2010). Only a clear and convincing evidence standard will be applied. CAL. PROB. CODE § 220 (West 2010).

the beneficiary may pass on to the now-deceased beneficiary's estate rather than to the testator's own heirs.⁷⁸ Presumably, the average testator would prefer to pass the property to his own relatives rather than to a relative of the beneficiary, because the heirs of the beneficiary are receiving a share based on their relation to the beneficiary instead of their relationship to the testator, who is the original owner of the property.⁷⁹

As a practical matter, the clear and convincing evidence standard leads to the "battle of the expert witnesses" arising from conflicting expert opinions on exact times of death with respect to two decedents.⁸⁰ Often the determination of death is one in which experts have to weigh complex definitions of death and analyze factors such as the manner of death, indicators of struggle or suffering, the position of the bodies, differences in body temperatures, signs of rigor mortis and lividity of the skin, condition of the eyes, and differences in the putrefaction or decomposition of the bodies.⁸¹ The interplay between these sometimes contradictory factors is compounded by the fact that only 300,000 out of an average million and a half deaths a year in the United States are investigated by coroners or medical examiners, leaving much of the determination of death to laypeople at the time of death or later by a jury.⁸²

The decision to utilize a holographic will leaves the decedent without the protection of the 120-hour rule. Sadly, the decedent would be protected by the 120-hour rule if they had executed no instrument at all—allowing his property to pass via intestacy. While the 120-hour rule does not eliminate complexities regarding determination of death, it is an efficient approach to ordering survival when mere seconds, minutes, or hours is the yardstick against which a determination must be made.

78. *Id.*

79. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 ("Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours or even days. They would not want property to pass to one side of the family solely due to an instant of survival.").

80. See Alexander Morgan Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 92–93 (1972) (regarding difficulties in determining death); see also *id.* at 93 n.23 (defining death according to Black's Law Dictionary (citing *Thomas v. Anderson*, 215 P.2d 478, 482 (Cal. Ct. App. 1950))). For an example of the effects of determination of death, see Henry Pierson Curtis, *Medical Examiner on Hot Seat*, ORLANDO SENTINEL, Nov. 8, 2002, at B1 (couple dies in head-on collision and medical examiner originally determines times of deaths to be identical, but later reviews the findings and determines the wife outlived the husband by minutes entitling the wife's heirs to the entire \$250,000 life insurance policy).

81. Elizabeth T. Tsai, Annotation, *Construction, Application, and Effect of Uniform Simultaneous Death Act*, 39 A.L.R.3d 1332, 1339 (1971).

82. *Id.*

B. *Formally Attested Wills*

When planning an estate for a married couple, a competent attorney will address a potential simultaneous death issue in the drafting process⁸³ by incorporating language into the governing testamentary instrument.⁸⁴ It is typical for the will of a husband or a wife to stipulate either that one survived the other in the case of simultaneous death, or alternatively, that one spouse must survive the other by a specified period of time—or will be treated as “predeceased.”⁸⁵

“However, such provisions are rarely used between parents and their children”⁸⁶ More often than not, the document will provide only that property is gifted to a child or beneficiary on the condition that he survive the testator, “otherwise to (an alternative beneficiary).”⁸⁷ The problem with this is obvious. The order of death is not proscribed in the instrument, and as section 220 applies, only the clear and convincing standard will apply to the order of the deaths, without the ease of administration offered by the bright line of a 120-hour rule.⁸⁸

Several problems arise when an attorney fails to include an adequate survivorship clause in the formally attested will because the clause is ambiguous, incomplete, or omitted.⁸⁹ This failure will likely result in a malpractice action filed against the drafting attorney,⁹⁰ and the wronged heir will have standing to sue as a third party beneficiary of the will.⁹¹

83. A common practice guide advises attorneys to include a survivorship provision in a will. Donald R. Travers, *Survivorship and Alternate Disposition*, in CALIFORNIA ESTATE PLANNING § 5.38 (Robert Denham et al. eds., 2008).

84. *See id.*

85. Harris, *supra* note 2, at 766.

86. *Id.*

87. *See id.* at 766–67.

88. CAL. PROB. CODE § 220 (West 2010).

89. For instance, common disaster clauses may not protect the testator when the decedents die in a close proximity of time but because of different events. *See* Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 123 (1991) (“Many wills contain common disaster clauses. . . . [H]owever, the clause does not apply because testators do not die as a result of the same event.”).

90. *Id.* at 110 & n.65, 130 (citing *Ogle v. Fuiten*, 445 N.E.2d 1344, 1346 (Ill. App. Ct. 1983), *aff’d*, 466 N.E.2d 224, 228 (Ill. 1984)); *see also* 4 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 34:12 (2010) (noting that draftsmanship of a will containing errors in the substance of the documents is a common claim for malpractice).

91. *See* Begleiter, *supra* note 89, at 104–05.

In a state such as California,⁹² this omission will almost certainly give rise to malpractice recovery, because every attorney who drafts a will is held to the expertise of a certified specialist.⁹³ In effect, an attorney will be held to the higher standard of care that is imposed upon certified specialists, even if the attorney claims not to be a specialist, and has never held himself out to the public as a specialist, so long as his case is one where the attorney should have recognized the existence of a specialty area and should have referred the case to a specialist.⁹⁴

However, a malpractice action against an unskilled or incompetent attorney is not an adequate remedy in this instance, as the main actor—viz. the decedent—is unable to bear witness and testify.⁹⁵ A malpractice suit is often impossible or impractical when the attorney did not accurately or adequately counsel the decedent about simultaneous death because a malpractice action requires that the decedent's intent be established, and an obvious evidentiary obstacle exists.⁹⁶

Amending an inconsistent statute is clearly a more efficient alternative to a malpractice action. Under current Code provisions, the intestate decedent—who fails to express his wishes regarding the devolution of his estate—is more protected than either the unrepresented decedent who attempts to write his own will, or the decedent who unknowingly retains incompetent

92. The following states offer specialization directly to lawyers: Arizona, California, Florida, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Texas. ABA Standing Committee on Specialization, Sources of Certification, <http://www.abanet.org/legalservices/specialization/source.html> (last visited Feb. 26, 2010). The following states approve specialization programs by state bars or other organizations: Alabama, Idaho, Indiana, Maine, Minnesota, Ohio, Pennsylvania, and Tennessee. *Id.*

93. See 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 20:4 (2010) (discussing the increasing likelihood of malpractice where an attorney undertakes a task in a specialized area of the law and fails to “exercise the degree of skill and knowledge possessed by those attorneys, who practice in that specialty”); see also *Goebel v. Lauderdale*, 263 Cal. Rptr. 275, 276 (Ct. App. 1989) (bankruptcy attorney was sued for failing to inform his client of certain penal code sections); *Day v. Rosenthal*, 217 Cal. Rptr. 89, 104 (Ct. App. 1985) (attorney was sued for failure to discuss tax law consequences with client); *Horne v. Peckham*, 158 Cal. Rptr. 714, 716 (Ct. App. 1979) (general practitioner was sued in connection with drafting *Clifford* trust).

94. Buddy O. Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 86 (1998).

95. In most instances, conversations between the attorney and the decedent will be private and confidential—without witnesses present. If and when a witness is present for such conversations, it may be the spouse or child whose closely proximate death, ironically, gives rise to the simultaneous death issue at the crux of a malpractice action.

96. See Begleiter, *supra* note 89, at 110–11.

counsel.⁹⁷ Amending the Code would provide a statutory safety net for the latter decedents.

III. INCONSISTENT LEGISLATION—INDICATES INTENTIONAL OMISSION

In 1980, the California Legislature passed a resolution to have the California Law Revision Commission (CLRC) study probate law and provide recommendations for revisions to the California Probate Code.⁹⁸ The CLRC concluded that the California Legislature needed to supplant the “clear and convincing evidence” evidentiary standard in the California Probate Code with a 120-hour rule.⁹⁹ At the time the study was conducted, at least thirteen states had adopted the same requirement.¹⁰⁰

The CLRC expressed concern about the serious injustice that may arise from the application of the “clear and convincing evidence” standard in cases where a husband and wife each have children from a prior marriage.¹⁰¹ Generally, there was a concern with the inequities that inhere to the devolution of a decedent’s estate hinging upon a mere snapshot in time.¹⁰² The study found that the average person does not want all of his estate to pass to *someone else’s heirs*, as opposed to his own, simply because he had the misfortune of dying five minutes too soon.¹⁰³

The CLRC believed that the 120-hour rule would prove to be more of a panacea than a pitfall, and it should apply as a default standard for both wills and intestacy.¹⁰⁴ They found that it is an efficient rule, that almost entirely eliminates the need for litigation to determine order of death, and yet, it is a brief period of time that will not delay the administration of an estate.¹⁰⁵

When it came time to codify the recommendation of the CLRC, the California Legislature incorporated a 120-hour rule into California Probate Code

97. Intestate decedents are protected by the 120-hour rule in California Probate Code section 6403(a) which is absent from section 220. CAL. PROB. CODE §§ 220, 6403(a) (West 2010).

98. *Recommendation Relating to Non-Probate Transfers*, 15 CAL. L. REVISION COMMISSION REP. 1605, 1607 (1980).

99. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 445.

100. *Id.* at 448 n.3.

101. *Id.* at 447. The number of people with children from different marriages has risen. Averill, *supra* note 41, at 895 & n.19.

102. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448.

103. *Id.*

104. *See id.*

105. *Id.*

section 6403,¹⁰⁶ but not into California Probate Code section 220.¹⁰⁷ As a result, the 120-hour rule applied only to intestacy. One can only speculate as to the reasons underlying the partial legislative change, as the legislative history on this issue is scant.¹⁰⁸ A decade later, arguments set before the California Legislature may clarify the hesitancy to extend the rule across the breadth of the California Probate Code.

In 1990, Senate Bill 1775 proposed the application of the 120-hour rule to the California statutory will.¹⁰⁹ The stated purpose for this revision was to distribute property in a “manner most consistent with the decedent’s intentions and to avoid litigation over the precise time of death in common accident cases.”¹¹⁰ Additionally, it was noted that the revision would create consistency between statutory wills and intestate succession.¹¹¹ The drafters of the bill recognized the policy behind the 120-hour rule was just as applicable to statutory wills “since a person executing a statutory will cannot indicate a preference as to the length of time a person must survive him or her in order to be a beneficiary under the will.”¹¹²

106. The Committee’s recommendations were enacted in part through the addition of the 120-hour time requirement for intestacy to California Probate code section 64. See 1989 Cal. Stat. 1818-19.

107. See 1989 Cal. Stat. 1815-26.

108. There is not a lot of legislative history at the time of adoption for this part of Assembly Bill 158. This may have been because there was an unrelated highly controversial part of the bill which pertained to no contest clauses (in terrorem clauses).

109. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary, 1990 Reg. Sess. (Aug. 8, 1990) [hereinafter Assem. Comm. on Judiciary]. Statutory wills were first enacted in California in 1982. See CAL. PROB. CODE § 6240 (West 1990). These wills are designed as an alternative for those who would otherwise die intestate. Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 779 (1993).

110. Cal. Bill Analysis, SB 1775, S. Rules Comm., 1990 Reg. Sess. (Aug. 16, 1990).

111. CAL. LAW REVISION COMM’N, AUTHOR’S STATEMENT, RECOMMENDATION OF S.B. 1775, at 1 (1990).

112. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary, *supra* note 109, at 3. The statutory will is not a flexible instrument, in that it cannot be amended or changed by the testator. CAL. PROB. CODE § 6226(b) (West 2010). Section 6226(b) of the *California Probate Code* provides:

Any additions to or deletions from the California statutory will on the face of the California statutory will form, other than in accordance with the instructions, shall be given effect only where clear and convincing evidence shows that they would effectuate the clear intent of the testator. In the absence of such a showing, the court either may determine that the addition or deletion is ineffective and shall be disregarded, or may determine that all or a portion of the California statutory will is invalid, whichever is more likely to be consistent with the intent of the testator.

Id.

This statutory amendment was not without its opposition, although at best, it can be described as substantively vacuous.¹¹³ The State Bar of California Estate Planning, Trust and Probate Section objected to the extension of the 120-hour rule as it would shift assets to non-intended beneficiaries and result in adverse federal transfer tax consequences.¹¹⁴ The overarching purpose of the probate code is to govern the way in which the decedent's assets are distributed, and almost any change or amendment can be said to directly or indirectly shift property to an unintended beneficiary. This argument, without more, is superfluous as almost any change to the probate code can be objected to on the grounds that it would shift property to non-intended beneficiaries since the entire code's purpose is to determine the distribution of property. Additionally, there is no subsequent discussion as to how the State Bar of California Estate Planning, Trust and Probate Section came to the conclusion that a statutory will drafter would prefer to pass property on through a deceased beneficiary with the result that it is given to non-blood relatives of the deceased. Without any reference to the contrary, it would seem obvious that average testators would rather have their property pass to their relatives than relatives of their spouse if their spouse only managed to survive them by seconds or hours.¹¹⁵ Although tax avoidance is often a concern in estate planning, most decedents would probably prefer to leave their property to their blood relatives than to avoid generation transfer skipping taxes, and these taxes often apply to larger estates, which presumably would not be using a statutory will.¹¹⁶

With regard to Senate Bill 1775, the CLRC found that the same policies that justified the earlier adoption of the 120-hour rule for intestacy justified its present extension to statutory wills; intestate succession is akin to a statu-

113. See Memorandum from Maurine C. Padden, Legislative Counsel, Cal. Bankers Ass'n on Study L-3022-Access to Decedent's Safe Deposit Box, to Bill Lockyer, Cal. State Sen. 1 (June 18, 1990).

114. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary Republican Analysis, 1990 Reg. Sess. (Aug. 14, 1990) [hereinafter Republican Analysis].

115. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448. "Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival." *Id.*

116. The Generation Skipping Tax (GST) applies when a gift skips a generation, going from grandparent to grandchild. Sandy Kasten, *Tax Considerations in Estate Planning*, in COMPLETE PLANS FOR SMALL AND MID-SIZE ESTATES § 3.50, 100-01 (2006). The gift is viewed as going from the parent to the child and then to the grandchild; and by doing so, imposes a transfer tax at each generation. *Id.* However, this tax often only applies to larger estates because of a GST tax exemption for estates smaller than \$2,000,000 in 2006. *Id.*

tory will for those who have failed to execute any type of will.¹¹⁷ However, the CLRC changed its position—albeit quietly—with regard to incorporation of the 120-hour rule into California Probate Code section 220,¹¹⁸ which as a practical matter, would extend the 120-hour rule to holographic wills and formally attested wills. In a footnote, the CLRC expressed that the 120-hour rule is superfluous for non-statutory wills, noting that

[w]hen a will is drafted for a testator, the person drafting the will can include or omit a survival requirement for beneficiaries of the will, according to the direction of the testator. A 120-hour survival requirement is recommended for a statutory will because the substance of that will is fixed by statute.¹¹⁹

In drawing this conclusion, the CLRC presupposes that every testate decedent has the assistance of competent counsel. As explored earlier in this Article, a survivorship clause may be unknowingly omitted when either the testate decedent drafts his own holographic will, or the decedent is represented by incompetent counsel.¹²⁰

IV. CALIFORNIA'S SOLUTION

The asymmetry in California's Probate Code emerges from the adoption of the 120-hour rule in a piecemeal “estate plan specific” manner—meaning, its application hinges upon the estate plan in effect at the time of the decedent's death. The 120-hour rule is the standard applied when the decedent dies intestate, or testate with a statutory will in effect. Conversely, the 120-hour rule is not applied when the decedent dies testate with a formally attested will or holographic will in effect.

That which makes the 120-hour rule a necessary protection for some decedents, renders it a necessary protection for all decedents. Application of this rule in an estate-plan specific manner leaves unprotected two important groups of decedents: The decedent who writes his own holographic will, and the decedent who unwittingly retained incompetent counsel to execute a formally attested will.

The legislative solution is simple: California Probate Code section 220 must be amended to replace the “clear and convincing evidence” standard

117. *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 CAL. L. REVISION COMMISSION REP. 549, 553 (1989).

118. *See* CAL. PROB. CODE § 220 (West 2010).

119. *Recommendation Relating to Survival Requirement*, *supra* note 117, at 553 n.2.

120. *See supra* Part II.A–B.

with a 120-hour rule. In effect, this will create a default 120-hour rule in California, and repair present legislative inconsistencies that prejudice the self-represented or incompetently represented. Further, section 220 must contain a proviso that a survivorship clause in a will may override the default rule.

A. *Benefits of the 120-Hour Rule*

The 120-hour rule is efficient in a myriad of ways, including decreasing litigation, avoiding double administration, and effectuating the average testator's intent.

This rule imposes an objective—though arbitrary—time period of five days between the two deaths, by which one decedent must survive the other to inherit.¹²¹ Under the “clear and convincing evidence” standard, the devolution of a decedent's estate will hinge upon whether one decedent survived the other by mere seconds or minutes—whereas, the 120-hour rule renders unnecessary expert opinions as to the precise second or minute. It provides an objective “yardstick” allowing deaths to be “ordered” for purposes of inheritance, without a costly battle of expert witnesses and protracted litigation.¹²² Arguably, even with the 120-hour rule, there will be cases where the experts will disagree about whether the time standard has been met. However, fewer cases will hinge upon determinations of mere seconds or minutes.

Further, in cases of closely proximate deaths, the 120-hour rule will allow property to avoid double administration, thereby preserving a greater portion of the probate estate.¹²³ Estate administration is not inexpensive.¹²⁴ In California, probate fees are statutorily predetermined and correlate to the size of the probate estate.¹²⁵ For an estate between \$100,000 and \$1,000,000, probate fees are approximately two percent of the probate estate value plus \$3000 for both the attorney and executor.¹²⁶ In the case of a \$500,000 estate

121. See CAL. PROB. CODE § 6403.

122. See *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 447–48 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

123. See CAL. PROB. CODE § 6403.

124. See Posting of Jennifer Sawday, *What Does Probate Cost in California?*, to California Estate Planning Practice Blog, http://sawdaydrake.typepad.com/estate_planning/2006/02/what_does_proba.html (last visited Feb. 25, 2010).

125. *Id.*

126. Law Offices of Merwyn J. Miller, *Frequently Asked Questions on Probate and Administration*, http://www.aboutlivingtrusts.com/Estate%20Admin/Estate%20Admin%20Faq.htm#_1_9 (last visited Feb. 26, 2010) [hereinafter *Frequently Asked Questions on Probate and*

that goes through double administration, the attorney and executor, combined, will receive fees totaling \$26,000 through the first probate process.¹²⁷ After these fees are netted, and the property passes to the deceased beneficiary's heirs through the second probate process, the attorney and executor, combined, will receive fees totaling \$24,960.¹²⁸ The fees total \$50,960 for the double administration of this estate, and additional fees may accrue if there are any services provided by the attorney or executor that are beyond the normal services.¹²⁹ Further, this is exclusive of costs of probate or any tax consequences to the estate.¹³⁰

Monetary considerations are not the only disadvantage of double administration of an estate. Probate is a time consuming process, sometimes taking more than a year for each administration.¹³¹ Fewer estates would suffer through double administration if the 120-hour rule were the default statutory position. This is a desirable outcome for most, if not all, estate plans. Conversely, it may be an undesirable outcome for the attorneys reaping a windfall from the fees earned on double administration.

Finally, assuming that Mother and Father—a married couple, each with children from prior marriages—are killed in an automobile accident, the children of Mother will receive all property of both Mother and Father—to the exclusion of Father's children—if they are able to establish that Mother survived Father by mere moments under a “clear and convincing evidence” standard.¹³² The application of the 120-hour rule for intestacy is said to effectuate the average intent of the decedent.¹³³ The average decedent would

Administration]. This is an oversimplified estimate of the calculation of the estate fees provided by an estate attorney. *Id.* The true values are

[f]our percent on the first one hundred thousand dollars (\$100,000), . . . [t]hree percent on the next one hundred thousand dollars (\$100,000), . . . [t]wo percent on the next eight hundred thousand dollars (\$800,000), . . . [o]ne percent on the next nine million dollars (\$9,000,000), . . . [o]ne-half of [one] percent on the next fifteen million dollars (\$15,000,000).

CAL. PROB. CODE § 10810 (West 2010).

127. See Posting of Jennifer Sawday, *Probate Cost*, *supra* note 124. This estimate includes only the attorney and executor fees. *Id.* Additional expenses for this size estate maybe closer to \$28,000. See *id.* (finding the approximate cost to be \$28,035 for an estate of \$515,000).

128. See *id.*

129. See Frequently Asked Questions on Probate and Administration, *supra* note 126.

130. See *id.*

131. Posting of Jennifer Sawday, *What is Probate?*, to California Estate Planning Practice Blog, http://sawdaydrake.typepad.com/estate_planning/2006/07/what_is_probate_2.html (last visited February 24, 2010) (“[P]robate can tie up the property and other estate assets for months and sometimes even more than a year.”).

132. *Recommendations Relating to Simultaneous Deaths*, *supra* note 32, at 447, 447 n.1.

133. See *id.* at 448 (“Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They

rather pass property to his heirs than to the heirs of his beneficiary. In no case is this clearer than when the two decedents have children from different marriages or relationships.¹³⁴

B. *Anticipated Criticisms*

The CLRC suggested that the 120-hour rule was superfluous and unnecessary in non-statutory wills because the drafter could omit or include a survivorship clause at the direction of the testator.¹³⁵ As explored in Section B of Part II, a troubling conundrum lurks at the heart of this conclusion: California authorizes the probate of holographic wills, largely—if not entirely—used by the unrepresented decedent, while simultaneously denying the same protections offered to the unrepresented decedent who opts for intestacy or executes a statutory will.¹³⁶ Further, the CLRC ignores the practical reality of incompetent representation—which may result in an uninformed or unintended omission of a survivorship clause from a professionally drafted will. Malpractice is not always a feasible remedy and is certainly less efficient than a default survivorship rule.

Other critics suggest that the 120-hour rule does not go far enough and the timeframe should be considerably longer.¹³⁷ The longer the survival requirement, the more reliable the approximation of the time of death becomes.¹³⁸ The 120-hour timeframe is concededly arbitrary;¹³⁹ however, it is

would not want property to pass to one side of the family solely due to an instant of survival.”).

134. See *id.* at 447 (“In this type of case, where one person dies soon after another, a serious injustice may result. For example, where a husband and wife who each have children from a former marriage die intestate in an automobile accident, all the community property will pass to the husband’s children if it can be shown that he survived his wife for a fraction of a second.”).

135. See *Recommendation Relating to Survival Requirement*, *supra* note 117, at 553 n.2.

136. See *supra* Part II.B.

137. Nancy G. Henderson, Henderson & Caverly LLP, Speech Prepared for the National Business Institute: The Basics of Will Drafting 61 (Sept. 20, 2004) (speech outline available at the Nova Law Review) [hereinafter Henderson, Speech] (“Most clients would prefer a longer survivorship period [than 120 hours] to accommodate the possibility of a common disaster which results in the death of the testator and the beneficiary within a relatively short period of time.”).

138. See *Recommendation Relating to Survival Requirement*, *supra* note 117, at 553 n.2. Unquestionably, it would be easier to determine with greater accuracy whether two people died more than a year apart, or even decades apart, than it would be to determine the deaths within a second or fractions of a second.

139. While it may be argued that twenty days or two days should be used, the time limit is not entirely arbitrary. See Henderson, Speech, *supra* note 137, at 61. For example, ninety days and six-month limits would trigger undesirable consequences, namely a loss of the bene-

simple and easily applied.¹⁴⁰ The 120-hour rule does not interfere with a testator's freedom to include a survivorship clause with a longer timeframe in his will.¹⁴¹ In this instance, the 120-hour rule of California Probate Code section 220 would be overridden by the language of testator's will.

A policy that drives this area of the law is the desire to effectuate the testator's intent.¹⁴² Symmetrical application of the 120-hour rule as a default position clearly approximates the intent of the average testator. In 1990, when the 120-hour rule was extended to statutory wills, the State Bar of California Estate Planning, Trust and Probate Section objected on the grounds that assets would be shifted to non-intended beneficiaries and adverse federal tax consequences would result.¹⁴³ The State Bar Section framed the wrong issue. The issue is not whether assets will flow to a "non-intended beneficiary"—but instead, whether the decedent would prefer that his assets devolve to the heirs of his "intended (deceased) beneficiary." The natural object of the average decedent's affection will be his heirs apparent—and as a matter of policy, it seems that the decedent would prefer that his assets flow to the natural object of his bounty, rather than the natural object of someone else's bounty.

V. CONCLUSION

In death, the California Probate Code does not afford the unrepresented layperson all of the same protections as the represented.¹⁴⁴ The 120-hour rule governs the devolution of assets in a simultaneous death scenario.¹⁴⁵ However, the adoption of the 120-hour rule by the California Legislature has been piecemeal and estate plan specific: Applying to intestacy and statutory wills, but not to non-statutory wills (including formally attested wills and holographic wills).

fit of generation skipping tax and the loss of the marital deduction to avoid estate tax, respectively. *Id.* ("[A] survivorship period of not more than 90 days is permissible for a grandchild to benefit from the generational move-up resulting from the death of a parent for purposes of the generation skipping transfer tax. Further, if a survivorship period of more than six months is imposed upon a surviving spouse's right to inherit, the marital deduction will not be available to shelter the gift to the spouse from estate taxes.").

140. 14 WITKIN, *supra* note 27, § 288.

141. See CAL. PROB. CODE § 221 (West 2010). It is not uncommon for an estate planner to include a survivorship clause ranging from sixty to one hundred twenty days.

142. See 96 C.J.S. *Wills* § 831 (2010) (explaining that the cardinal rule for will construction requires the intent of the testator be effectuated so long as it is ascertainable and does not violate law or public policy).

143. Republican Analysis, *supra* note 114, at 1.

144. See CAL. PROB. CODE §§ 220, 6403 (West 2010).

145. See CAL. PROB. CODE § 6403.

The testator with a non-statutory will is subject to the “clear and convincing evidence” standard of section 220, unless the instrument contains a simultaneous death provision.¹⁴⁶ Absent attorney incompetence or contravening testator’s intent, a formally attested, professionally drafted will generally contains a simultaneous death provision. Conversely, holographic wills are usually handwritten by a layperson decedent—and typically fail to contain simultaneous death provisions.

In a simultaneous death scenario, the devolution of a decedent’s estate should not be contingent upon the type of testamentary instrument (or absence thereof) executed by the decedent. Therefore, the 120-hour rule must be consistently applied throughout the California Probate Code, and adopted as a “safety net” when a non-statutory will does not express a contrary intent or standard. The policy rationale of the 120-hour rule, which prevents double administration of the estate and effectuates decedents’ probable testamentary intent, is equally applicable to those who create holographic wills or formally attested wills with insufficient survivorship clauses. The 120-hour rule should be incorporated into the current California Probate Code section 220 and associated code sections, thus creating equal protection for those who draft holographic wills or for testators whose attorney fails to provide a contrary survival provision in their will.

146. See CAL. PROB. CODE § 220.

CURRICULUM MAPPING: BRINGING EVIDENCE-BASED FRAMEWORKS TO LEGAL EDUCATION

DEBRA MOSS CURTIS*
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I. INTRODUCTION

In 2007, the faculty at Nova Southeastern University, Shepard Broad Law Center (NSU) approved a project for the Curriculum Committee designed to provide the law school with an evidence-based framework for considering curriculum enhancements and revisions. This article is designed to document the extended process in which the law school is engaged, and establish a framework for other schools that may wish to initiate their own curriculum project with the explicit aim of enhancing and aligning their curriculum and thus improve the learning and teaching of the law.

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The idea for curriculum mapping came to NSU through a faculty member who had seen a “curriculum map” for a K-5 school. Such a “map” was an end result—a document laying out the topics and skills that students would be learning at the school across the years, and how they interacted. He brought the idea to the law school with the notion that we could create such a document for our own curriculum, and use it as a resource for both faculty and students to better understand the sequence and relationship of and among courses.

Committee members began researching and investigating curriculum mapping. As we soon discovered, curriculum mapping is a process, not an end result.¹ After two years of dedicated effort, we are a faculty actively engaged in thinking about and documenting our curriculum, while collaborating in ways that we had only imagined could happen. Although we consider our work far from finished, we already have benefited greatly from having undertaken this process through improved communication, and greater attention to our teaching. This article tells our story while instructing others who may wish to engage in such a substantial evidence-based curricular process.

Part II of this article describes the curriculum mapping process as it is used in education generally. Part III discusses curriculum reform in the law school arena. Part IV of this article discusses our project—first the student survey process of the curriculum mapping project, then the faculty survey process, then the data collection and analysis process in which we engaged. Part V offers our conclusions and recommendations.

II. CURRICULUM MAPPING

Curriculum mapping is a coordinated effort conducted by faculty members to better understand the scope and sequence of their own curriculum with the explicit outcome of engaging in a coordinated and evidence-based reform process.² It is a process by which education professionals “document their own curriculum, then share and examine each other’s curriculums for gaps, overlaps, redundancies and new learning, creating a coherent, consistent curriculum within and across schools that is ultimately aligned to stan-

1. “Mapping is a verb. It is active,” according to Heidi Hayes Jacobs. JANET A. HALE, A GUIDE TO CURRICULUM MAPPING: PLANNING, IMPLEMENTING, AND SUSTAINING THE PROCESS, at xv (2008) [hereinafter HALE, A GUIDE TO CURRICULUM MAPPING].

2. See Fenwick W. English, *Curriculum Mapping*, 37 EDUC. LEADERSHIP 558, 558 (1980).

dards and responsive to student data and other . . . initiatives.”³ One purpose of mapping is that “[s]tudents should know where they are going, why they are going there, and what is required of them to get there.”⁴

The idea of mapping a curriculum was popularized by Fenwick English in the 1980s as a “reality-based” documentation of the curricular content that is actually taught, and matching it against the prescribed assessments.⁵ In the next decade, Heidi Hayes Jacobs enlarged and expounded on that idea, and proposed a multi-phase process for accomplishing the mapping process.⁶ In this multi-phase process, the first question to consider when undertaking such a project is, “what is curriculum?”⁷ It has been suggested that “curriculum is developed from any material a teacher refers to or uses to decide what to teach, when to teach it, and how much of it to teach,” which may include textbooks, state and national guidelines, administrative directives, and personal experiences, among others.⁸ In examining curriculum, when these varying resources and the use of them are not documented or shared in meaningful ways by teachers, the result can be an experience by students that is less than optimal.⁹

The reality across many areas of education, including higher education, is that faculty often holds little or no direct knowledge of what *others* are actually teaching in their courses, coupled with a poor sense of the curriculum in its entirety.¹⁰ Even among faculty within a given specialty area, or who teach different sections of the same course, these gaps can be significant.¹¹ When little or no data about what is actually being taught in classrooms is available, one of two things may result—either schools defensively project the image of being in lockstep with regard to curriculum across the institution, or schools become overly loose in terms of monitoring their curriculum such that there is little or no understanding of what is really going on in the classroom.¹² A big-picture understanding of a student’s journey

3. SUSAN UDELHOFEN, *KEYS TO CURRICULUM MAPPING: STRATEGIES AND TOOLS TO MAKE IT WORK*, at xviii (2005).

4. Oklahoma State Department of Education, Curriculum Mapping, <http://sde.state.ok.us/Curriculum/CurriculumDiv/CurriculumMap/default.html> (last visited Feb. 21, 2010).

5. UDELHOFEN, *supra* note 3, at xviii.

6. *Id.*

7. *Id.*

8. *Id.* at xviii–xix.

9. *Id.* at xix.

10. See HEIDI HAYES JACOBS, *MAPPING THE BIG PICTURE: INTEGRATING CURRICULUM & ASSESSMENT K–12* 3 (1997).

11. See DAVID M. MOSS & HELEN A. MARX, *A REPORT ON THE ALIGNMENT AND ASSESSMENT OF THE CA4 DIVERSITY AND MULTICULTURAL LEARNING OBJECTIVES OF THE GENERAL EDUCATION CURRICULUM* 14 (2009).

12. JACOBS, *supra* note 10, at 3.

through the educational process is a necessary part of providing that education.¹³ Curriculum committees that are charged with the review and approval process for new courses sometimes may lose sight of the details underpinning the curriculum, and thus are limited in their ability to ensure a well-sequenced and coherent curriculum.¹⁴

Historically, curriculum mapping has focused on externally monitoring what actually was being taught within a given curriculum and ensuring that instructors were spending the appropriate amount of “time on task.”¹⁵ By contrast, *contemporary* curriculum mapping projects, such as the one piloted at the law school, are designed to generate authentic data regarding what students actually experience—as opposed to what is merely planned for in the syllabus—with the aim of generating faculty consensus around a well articulated set of learning outcomes.¹⁶

A curriculum map may be useful to a faculty for many reasons, including helping teachers to understand what is taught throughout a program, coordinating interdisciplinary units, serving as a “venue for fostering conversation about curriculum” among faculty, helping students find the connections between subjects in a curriculum, and helping teachers to reflect upon their own teaching.¹⁷ For example, regarding the substance of courses, a curriculum map resulting from this data will enable a faculty to understand when a particular doctrine is actually taught, how it is taught, and if taught more than once, in what sequence. This information then allows the faculty to determine whether instructional changes are warranted to meet the broader learning goals.

Other fields have used outcome assessment planning and mapping in their curriculum building. The Accreditation Counsel for Graduate Medical Education (ACGME) has an outcome project in which assessing the program’s actual accomplishments is used as a core measurement in evaluating the curriculum.¹⁸ The National Council for Accreditation of Teacher Education (NCATE) makes use of extensive self-study requirements centered around a university’s core curriculum, and governs performance-based state licensing for teachers as well as board certification of accomplished teach-

13. *Id.*

14. English, *supra* note 2, at 558.

15. *Id.*

16. *Id.* at 558–59.

17. Curriculum Mapping, What Is It? A Practical Explanation from Least Tern (July 2003), <http://www.leasttern.com/workshops/Mapping/WhatIsCurricMapping.ppt.pdf> [hereinafter Curriculum Mapping, What Is It?].

18. The ACGME Outcome Project: An Introduction, http://www.acgme.org/outcome/project/OPintorev1_7-05.ppt (last visited Feb. 21, 2010).

ers.¹⁹ At the institutional level, the Harvard School of Dental Medicine has developed a problem-based approach in which concepts are mastered through group discussion and analysis of real patient cases,²⁰ and their curriculum map demonstrates an interdisciplinary approach to professional training.²¹

By mapping the actual *delivered* curriculum, the law school faculty then may engage in what is commonly referred to as a “backward curriculum design initiative.”²² That is, the resulting maps of key courses and program areas will enable the faculty to evaluate, based on data, what we are teaching across the curriculum, and if desired, plan for courses and experiences which will result in an improved learning experience for all law candidates.²³ By “using data-driven evidence rather than ‘verbal claims,’” an accurate assessment can be made.²⁴

This process has been described as “backward” in that it mandates goals to be firmly set, then evidence is considered (assessment) *prior* to any specific activities or experiences being finalized.²⁵ Such an approach is ironically quite forward-thinking and consistent with the current research on curriculum design and reform.²⁶ Such an approach holds the greatest potential for an evidence-driven curriculum where accountability is transparent and all stakeholders are involved.²⁷

Curriculum mapping is at its essence a process—a process of collecting and analyzing data that identifies the core content and assessments used in curriculum for subject areas—with the purpose of improving communication and instruction throughout the curriculum.²⁸ According to Heidi Hayes Ja-

19. National Council for Accreditation of Teacher Education (NCATE), NCATE’s Role in a Quality Assurance System for the Teaching Profession, <http://www.ncate.org/public/ncatrole.asp?ch=1> (last visited Feb. 21, 2010).

20. Harvard School of Dental Medicine, Curriculum Overview and Organization, http://www.hsdm.harvard.edu/index.php/academics/dmd/curriculum_overview_and_organization (last visited Feb. 21, 2010).

21. Harvard School of Dental Medicine, Curriculum Map (June 15, 2005).

22. GRANT WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 14 (2d ed. 2005) (emphasis added).

23. *See id.* at 14–15.

24. HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 3 (quotations added).

25. *See* WIGGINS & MCTIGHE, *supra* note 22, at 14–15 (emphasis added).

26. *See id.*

27. *See id.* at 15.

28. Curriculum Mapping, What Is It?, *supra* note 17. Least Tern is a consulting firm of two educators who state:

We believe in the change that computers and other technologies brings [sic] to education. We do not believe that this change means the extinction of the educational values that can be called “traditional.” Rather, we believe that a traditional education is enriched by technology tools and by the wealth of resources available on the Internet. We do, however, believe that change

cobs, author of *Mapping the Big Picture*, there are seven phases for curriculum mapping.²⁹ In phase one, teachers collect the data, including the processes and skills emphasizing the content of concepts and topics and the products/performances of the assessments.³⁰ This process will be described fully in Section IV, as it comprises the bulk of the pilot curriculum mapping project at NSU Law to date, and has already produced extremely useful information for the law school.

Once this basic set of knowledge is gathered, phase two is a “first read-through” of colleagues’ curricula and a basic editing and comprehension by faculty of what is being taught to their shared students.³¹ From there, phases three and four are “mixed group” reviews of the data, with such groups first including people who generally do not work together, followed by a large group review of the data by the entire faculty.³² The purposes of these phases are “reporting out,” gathering commentary, and professional development.³³ It is not a judgmental process regarding the persons involved or the successes of individual faculty.³⁴ Making this process non-judgmental may be held with a pre-determined process to set the stage for this often complex interaction, with roles assigned to various faculty to keep participants on task, such as being a recorder, timekeeper, or facilitator.³⁵ Such roles can help keep the procedure running smoothly, ensure all stakeholders are engaged in the process, and focus on sharing, not evaluating information.³⁶

One question that is frequently asked about curriculum mapping is, “what are we going to do with the information?” Such a question may be asked out of uncertainty as to the purpose of the project, out of wariness for a perceived need for change, or perhaps from the desire to make changes. The data collected from a curriculum map allows the stakeholders in the school’s curriculum to take a variety of avenues with the information—from making no changes at all to making drastic changes. It is important for faculty to

requires a rebirth of the adventure of learning and an affirmation that learning is a process of guided discovery. It is our hope that we can help teachers to become energetic, empowered, restless users of classroom laptops and other technologies. We offer our knowledge and help inexpensively and to small groups, focusing upon a core of “learning for teaching” content that can be immediately used in the classroom.

Least Tern, About Least Tern, <http://www.leasttern.com/WhoAre.html#why> (last visited Feb. 21, 2010).

29. JACOBS, *supra* note 10, at 7.

30. *Id.* at 8.

31. *Id.* at 10–11.

32. *Id.* at 12–13.

33. *See id.*

34. *See* UDELHOFEN, *supra* note 3, at xviii.

35. *See id.* at 40, 43.

36. *See id.* at 43.

remember that they have this range of decision-making power—and a wide variety in between.

These first four phases set the stage for the final decision making phases.³⁷ In phase five, faculty actually start to determine what changes, if any, need to be made based on the evidence presented.³⁸ For example, there may be some “glaring” elements of the curriculum that are unnecessary repetitions or areas of omission of coverage that the faculty can spot and revise immediately. It is important to note though that this “low hanging fruit” approach is not the end.³⁹ This stage is followed up with phase six, which is determining potential curricular changes that will “require long-term research and development.”⁴⁰ In this phase, there might be a longer, studied consideration of integrating courses, interdisciplinary work or larger changes in the structure that will require more research.⁴¹ By going through the mapping program through this phase, a curriculum committee can lead a faculty through the examination of their curriculum through evidence-based work, rather than on the mere notions of faculty who may, or may not, call for change based on personal experiences alone without a broader perspective on the entire curriculum.⁴²

The last phase in curriculum mapping is perhaps the most daunting in terms of resources and commitment to ongoing improvements in the curriculum—continuing the cycle of curriculum review.⁴³ A school should set up an appropriate cycle in which the process will reboot to ensure that faculty and students remain on the cutting edge of curriculum innovation based upon the most current data.⁴⁴

It is also important to note that for some schools, the curriculum map may serve only as an information source for faculty members.⁴⁵ An effective educator must know extensive information about the students, including how to build on what students already know, and being able to prepare them for where they will be heading.⁴⁶ Even if mapping is used for this basic purpose of bringing faculty members up to speed on what is happening in their program, that is progress in terms of benefits for their students.⁴⁷ However,

37. See JACOBS, *supra* note 10, at 8–13.

38. *Id.* at 13–14.

39. *Id.*

40. *Id.* at 14.

41. See *id.* at 14–15.

42. See JACOBS, *supra* note 10, at 14–15.

43. See *id.* at 15.

44. See *id.* at 15–16.

45. See *id.* at 17.

46. *Id.*

47. See JACOBS, *supra* note 10, at 17.

educators may choose to take the process further, through phases five and six.⁴⁸

An additional area for reform may be to identify possibilities to integrate disciplines.⁴⁹ As Jacobs states, “merging concepts from two or more disciplines can make for a powerful and lasting learning experience.”⁵⁰ Mapping can serve as a tool for effectuating that integration, to whatever degree faculty members choose.⁵¹

Another area in which mapping may be useful is to ensure that assessments of students are aligned with the goals set for student learning.⁵² Through mapping, assessments and learning can be correlated and checked to see that what is taught is assessed, and vice versa.⁵³

A final use of mapping is to help ensure that what is being taught to students is timely and up-to-date.⁵⁴ As faculty members review and share their maps, they may incorporate the other practices—of seeking gaps and eliminating unnecessary repetitions—to cull outdated materials or find opportunities to incorporate new materials in the field.⁵⁵

It is important to note that all of these potential applications of the mapping process are within the discretion of faculty members. Rather than imposing some form of external control or mandate on faculty members, mapping can empower faculty to gain a more comprehensive and rich understanding of what actually happens in their schools and how best to deliver their curriculum to their students.

III. LAW SCHOOL CURRICULUM REFORM TODAY

This article is not meant to provide a comprehensive summary of those important changes and works, but merely to place our project into the context of the voice of legal education curriculum reform today. It is well-documented that, as a whole, law school curricula has been dominated by the Harvard model set out by Dean Langdell and that, for many years, few schools deviated from such a program.⁵⁶ This case study model was the vast-

48. *Id.* at 13–15.

49. *Id.* at 20.

50. *Id.*

51. *Id.*

52. JACOBS, *supra* note 10, at 22.

53. *Id.* at 23.

54. *Id.*

55. *See id.*

56. Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 399–400 (1998).

ly dominant force in legal education.⁵⁷ However, since the 1960s, most schools have made some changes, incorporating more legal writing and clinical programs, as well as other changes.⁵⁸ Many scholars today still believe that the law school educational program has not yet reached the level of reform needed.⁵⁹

In recent years, however, the idea of revising legal education has gained significant momentum. Many attribute the opening of the gateway to curriculum re-examination to the ABA task force created MacCrate Report, which in 1992, recommended a variety of changes to legal education to ensure that schools were producing competent, ethical lawyers.⁶⁰ Although it was certainly not the first or only call for reform of curricula, it made one of the largest impacts on the profession.⁶¹ At its core were “ten fundamental lawyering skills and four professional values” which the report asserted should be acquired by new lawyers, as well as urging an opening of the dialogue about law school curriculum and what is being taught.⁶²

Since the time of the MacCrate report, a few more works have had a significant impact on discussions of curriculum in legal education. One such resource, *Best Practices for Legal Education*, was developed from a Clinical Legal Education Association project in 2001, and has become a source of great discussion among faculties.⁶³ “This book provides a vision of what legal education might become if legal educators step back and consider how they can most effectively prepare students for practice.”⁶⁴ The book draws on resources, such as *Educating Lawyers* from the Carnegie Foundation for the Advancement of Teaching, and has been instrumental in re-opening many of the doors into curriculum examination initiated by the MacCrate

57. *Id.* at 400.

58. Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 274 (1992).

59. *Id.* at 276.

60. Russell Engler, *From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade*, 23 PACE L. REV. 519, 519 (2003). The 414 page report was issued by the American Bar Association’s Section of Legal Education and Admissions to the Bar, but the task force was chaired by Robert MacCrate. Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 113 (2001) [hereinafter Engler, *The MacCrate Report Turns 10*]. It is through his name that the report is commonly known.

61. See John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317 (1987) for a detailed discussion of the curriculum reform agenda to date.

62. Engler, *The MacCrate Report Turns 10*, *supra* note 60, at 113.

63. See generally ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

64. *Id.* at 1.

Report.⁶⁵ Another such resource is *Transforming Legal Education*, which is a “critical inquiry into the identity and possibilities of legal education, and an exploration of alternatives to our current theories and practices of teaching and learning the law.”⁶⁶ This work advocates, among other points of view, interdisciplinary approaches to reimagining the potential for legal education.⁶⁷

Law reviews have published articles urging the reform of legal education or reflecting on this history. For example, in 2001, one author contended that the mainstream law school curricula did not pay sufficient attention to “cultural and transnational dimensions” of the law, while offering proposals to make some of those changes.⁶⁸ Another author offers a demonstration of “what rhetorical study can offer to the study of law.”⁶⁹

A current initiative from the ABA Section on Legal Education has considered outcome measures as a tool in the accreditation process.⁷⁰ In July, 2008, a *Report of the Outcome Measures Committee* was published, the result of a charge to “determine whether and how we can use output measures, other than bar passage and job placement, in the accreditation process.”⁷¹ The committee gathered information about approaches used by other accrediting agencies and also examined the law schools’ approaches.⁷² Ultimately, the report made the recommendation that the ABA accreditation standards should be reexamined and reframed to “reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”⁷³ That is, evidence should be paramount in the process.

Outcome measures in this context mean judging the accreditation of law schools by concentrating on “whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capacities, as well as achieving whatever other specific mission(s) the law school has adopted.”⁷⁴ This is in contrast to the current system,

65. *Id.*; see also WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

66. PAUL MAHARG, *TRANSFORMING LEGAL EDUCATION: LEARNING AND TEACHING THE LAW IN THE EARLY TWENTY-FIRST CENTURY*, at ix (2007).

67. See *id.* at 14.

68. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: A Theoretical Framework*, 26 OKLA. CITY U. L. REV. 547, 550–51, 559 (2001).

69. Marianne Constable, *On the (Legal) Study Methods of Our Time: Vico Redux*, 83 CHI.-KENT L. REV. 1303, 1305 (2008).

70. See Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, 2008 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B. 1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 3.

which some maintain is paying too close attention to what resources a law schools are investing in to achieve their goals.⁷⁵ An outcome-oriented approach would alter standards such as Standard 302, which addresses the areas of learning in which a law school should engage.⁷⁶ Such a change in the process by which law schools are evaluated for their accreditation certainly would have an impact on the curriculum and affect the delivery of it at any school.

Another program, the Institute for Law Teaching and Learning, which is co-sponsored by the law schools at Washburn University and Gonzaga University, has as one of its goals “student-centered curriculum reform.”⁷⁷ It offers resources, consulting, and workshops to assist law schools in working on their curricula.⁷⁸

One such resource available to schools on the website is its “Chart of Legal Education Reform,” documenting law schools and their proposed or adopted reforms.⁷⁹ Sixty-one schools are listed as engaging in some type of curriculum reform, ranging from integrating 1L courses, to expanding legal writing, to creating special programs to address certain skills.⁸⁰ It is likely that not all law schools have reported for inclusion in this chart, so more instances of reform may be occurring, such as the one currently at NSU Law.

In March 2009, the Legal Education Analysis and Reform Network (LEARN) report was sent to all deans.⁸¹ The LEARN is comprised of ten law schools working with the Carnegie Foundation for the Advancement of Teaching to “promote thoughtful innovation in law school curriculum, pedagogy and assessment.”⁸² The schools’ involvement began with working

75. See Carpenter et al., *supra* note 70, at 3.

76. *Id.* at 18. Ten other professional areas of learning were evaluated, including “allopathic and osteopathic medicine, dentistry, veterinary medicine, pharmacy, psychology, teaching, engineering, accounting, and architecture,” and all accrediting bodies for these areas apply standards based on outcome measures. *Id.* at 20. For example, the ABA has added a rule regarding the relationship between the bar-passage rate of the student body and accreditation. *Id.* at 16.

77. Institute for Law Teaching and Learning, Mission of the Institute, <http://lawteaching.org/about/> (last visited Feb. 21, 2010).

78. *Id.*

79. *Id.*

80. *Id.*

81. See Posting of Mary Lynch to Breaking News: LEARN Report Sent to all Deans, <http://bestpracticeslegaled.albanylawblogs.org/2009/03/06/breaking-news-learn-report-sent-to-all-deans/> (Mar. 6, 2009) [hereinafter Posting of Mary Lynch].

82. LEARN: LEGAL EDUCATION ANALYSIS AND REFORM NETWORK, GENERAL DESCRIPTION OF PLANNED PROJECTS 2009–2010, at 10, http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf (last visited Feb. 21, 2010) [hereinafter LEARN: GENERAL DESCRIPTION OF PLANNED PROJECTS 2009–2010]. The law schools are

groups formed at an initial planning meeting.⁸³ The first working group was charged with examining ways that LEARN could help law schools nationwide examine their curricula for expansion to a wider variety of subjects and learning environments.⁸⁴ The second group looked at means to communicate reforms to faculty members nationwide, while the third was charged with “examining the role that assessment plays in legal education.”⁸⁵ As a result, the groups have proposed projects for themselves that will help encourage the process of curricula reform nationwide.⁸⁶

The following is the list of proposed LEARN projects:⁸⁷

1. “LEARN will generate and disseminate a report on law schools’ efforts to implement curricular and pedagogical reform.”
2. “LEARN will create a website with a rich collection of teaching resources.”
3. “LEARN will conduct small teaching seminars and workshops for law teachers.”
4. “LEARN will design and operate a summer institute on law teaching.”
5. “LEARN will promote and facilitate rounds about teaching.”
6. “LEARN will coordinate collaboration in course development and teaching.”
7. “LEARN will create a network for institutional leaders.”
8. “LEARN will assess the use of interactive classroom technology.”
9. “LEARN will assess the use of periodic written assignments and/or examinations.”
10. “LEARN will assess the use of monitored wiki-postings and listservs.”

“CUNY Law School, Georgetown Law School, Harvard Law School, Indiana University School of Law (Bloomington), New York University School of Law, Southwestern Law School, Stanford Law School, University of Dayton School of Law, University of New Mexico Law School, and Vanderbilt University Law School.” *Id.* The report acknowledged that other law schools are involved in curriculum reform and expressed the hope that the network would grow. *Id.*

83. Posting of Mary Lynch, *supra* note 81.

84. LEARN: GENERAL DESCRIPTION OF PLANNED PROJECTS 2009–2010, *supra* note 82, at 10.

85. *Id.* at 10–11.

86. *Id.* at 11.

87. LEARN: GENERAL DESCRIPTION OF PLANNED PROJECTS 2009–2010, *supra* note 82, at 14–25.

11. "LEARN will assess the modifications to the end-of-term letter or number grade."
12. "LEARN will assess the use and assessment of simulations."
13. "LEARN will assess alternatives to the traditional bar examination."

It is clear that LEARN has a dynamic and ambitious plan to bring innovation, reform, and discussion of curriculum to law schools nationwide. NSU plans to bring its curriculum-mapping project to this dialogue.

In August 2009, the Southeastern Association of Law Schools held its annual meeting.⁸⁸ On one conference day, a workshop entitled "Curriculum Reform Workshop," included panels dedicated to the third year, the first year, coordinating curriculum reform and legal scholarship, and bringing a global perspective to curricular reform.⁸⁹ Representatives from several schools shared the innovations and the struggles to reach these new programs at their institutions.⁹⁰ For example, Dean Van Zandt of Northwestern University College of Law highlighted their accelerated two-year J.D. program, while Dean Smolla of Washington and Lee Law School discussed in detail their new third-year, practice-based program.⁹¹ The informal discussion on these topics had a repeated theme—that the law school curriculum has been stagnant, but that it has begun to change, and that many faculties find this conversation of change difficult. In addition, while some schools discussed interviewing focus groups or otherwise seeking some factual reason for making changes, other representatives admitted that many decisions about which courses were taught and when they were taught were largely based on anecdotal evidence, personnel, seniority, market forces, or other reasons.⁹²

88. Southeastern Association of Law Schools, 62nd Annual Meeting, August 2–8, 2009 at the Ritz Carlton, Palm Beach, Florida, Conference Program, *available at* <http://sealslawschools.org/wp-content/uploads/2010/02/2009-program.pdf> [hereinafter SEALS, Annual Meeting].

89. *Id.*

90. *See id.*

91. *Id.*; David Van Zandt & Michelle Greene, Op. Ed., *Stress Core Competencies*, NAT'L L.J., July 7, 2008, at 1. Some schools presenting curricular changes or talking about them were Mercer Law School, Emory Law School, Indiana University School of Law (Bloomington), Maurer School of Law, Elon Law School, and Loyola University, New Orleans College of Law. *See* SEALS, Annual Meeting, *supra* note 88.

92. SEALS, Annual Meeting, *supra* note 88.

The dean of Northwestern University College of Law proposed that there were differing approaches to change in the legal curriculum.⁹³ The first was that faculties add new or change substantive courses.⁹⁴ The second was that they add or change more technical, clinical, or experiential courses.⁹⁵ The third was that law schools have worked with delivery innovations.⁹⁶ The fourth was that curriculum change has focused on competencies.⁹⁷ The two major areas in which most participants on the panels and the audience reported change were in adding courses in practical education and professionalism.⁹⁸ But Professor Steven Friedland of Elon Law School, noted that changes in law school curriculum have been “nibbling around the edges,” and urged law faculties to communicate more with each other to consider what model of legal education could really work in an institution.⁹⁹

Ours is not the only law school to engage in curriculum mapping.¹⁰⁰ At that same 2009 SEALS conference, the Charlotte School of Law presented information on its own curriculum mapping project, during a session on “Measuring Educational Quality.”¹⁰¹ They demonstrated their educational outcomes and discussed their project.¹⁰² In 2007, the Charlotte School of Law faculty committed to the principles set forth in the Carnegie and Best Practices Reports, and then decided to build their curriculum based upon the educational outcomes necessary to accomplish the law school’s mission—to produce practice-ready lawyers.¹⁰³ After working through these outcomes and skills, they are now analyzing their results to determine what changes may be made to ensure that their curriculum delivers these outcomes.

Our project is certainly not the only one focusing on studying and re-thinking the law school curriculum, and several initiatives are discussed here. However, what we believe makes our project distinctive is that we are advo-

93. Dean David Van Zandt, Northwestern Univ. Sch. of Law, Speaker at the Southeastern Association of Law Schools, Annual Meeting, What to Do with the Third Year (Aug. 4, 2009).

94. *Id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* SEALS, Annual Meeting, *supra* note 88.

99. Professor Steve Friedland, Elon Univ. Sch. of Law, Speaker at the Southeastern Association of Law Schools, Annual Meeting, Invigorating the First Year and Other Required Courses (Aug. 4, 2009).

100. *See* SEALS, Annual Meeting, *supra* note 88; *see also* Jerry Parkinson, *Law School News*, 30 WYO. LAW, Oct. 2007, at 41.

101. *See* SEALS, Annual Meeting, *supra* note 88.

102. *Id.*

103. *See* Charlotte School of Law, Academics, <http://www.charlottelaw.edu/academics/default.asp?PageID=25> (last visited Feb. 21, 2010).

cating and detailing for others, a process for schools to use an evidenced-based analysis of a curriculum, without having a specific reform agenda.¹⁰⁴ We are currently evaluating our curriculum to see what students are actually, in reality (and not on paper) experiencing—and will use that knowledge in our future curriculum planning.

IV. THE PROJECT AT NSU LAW

As stated, the NSU Law project did not arise because we were dedicated to curriculum reform per se—such a statement would imply that we were committed to making changes and were seeking a tool that would accomplish them. Instead, we were seeking curriculum evaluation, or self-reflection. As discussed earlier, we were formally led to the idea of curriculum mapping through working with a consultant who specializes in curriculum and instruction. After our initial research into curriculum mapping revealed the intricacies of such a process, we quickly realized we were in over our heads and decided to hire a consultant.¹⁰⁵

We then learned that the first real step in a successful curriculum mapping project may require a shift in perception and understanding of curriculum by those who teach it.¹⁰⁶ Like many other law schools, many of our faculty held two common ideas about curriculum—first, what one teaches in one's classroom is private and a matter of academic freedom, as long as it is within generally accepted bounds, and second, owing to the model set out by Christopher Langdell, certain law courses were stagnant beings that should remain the same throughout the years.¹⁰⁷ However, a curriculum mapping process requires a change in these perceptions, and the understanding both that what went on in our classrooms should become public so that we all can learn from it, and that all courses, no matter how historical the subject matter, can and should be part of an ever-changing process.¹⁰⁸

104. Other law schools may be engaging in curriculum mapping efforts, but our process is quite detailed and moving quickly. See Parkinson, *supra* note 100, at 41. The authors note that there is much literature calling for or proposing law school reforms in curriculum, however, these appear all to be based on theories and suppositions, rather than evidence-based mapping.

105. Several such consultants exist and are available to schools. See Curriculum Mapping, http://www.curriculummapping101.com/Curriculum_Mapping.html (last visited Feb. 21, 2010). Law schools should consider that as mapping is new to legal education, any consultant with which you work must be interested in being flexible and learning new methods for the process to accommodate differences in the curriculum.

106. UDELHOFEN, *supra* note 3, at 9.

107. *Id.* at 9–10.

108. See *id.*

Personally knowing a faculty member in the Department of Curriculum and Instruction at the nationally ranked Neag School of Education at the University of Connecticut made getting started easier at NSU Law. After speaking with our consultant, who laid out the process and what it would involve, the next step was to approach our dean and ask for funding for such a project. Using information provided by the consultant, along with a plan of what we would accomplish at the Law Center and a proposed budget, the dean agreed to fund the cost of the consultant to get our project off the ground.

The consultant, Dr. David M. Moss, arrived at the Law Center in January 2008. The two faculty members heading the project met with Dr. Moss for nearly two full days, getting a crash course on the world of curriculum mapping, including goals, procedures, and a new vocabulary. Most of the second day was spent setting specific tasks by which our faculty could proceed.

It became clear that our main focus would be to establish a baseline dataset upon which informed curriculum decisions could be rendered. The data collection would have three components and would be updated annually. The first component of the data was the development and implementation of a survey designed for recent law school graduates. The second component of the data was to come from a faculty survey by which we could evaluate our own thoughts and beliefs about our curriculum. The third, and by far the most time-consuming and labor-intensive, was the curriculum mapping—documenting—initiative. We decided that academic year 2008–2009 would be a pilot year—to “test drive” both surveys and have a small group of faculty work through the process of documenting the curriculum and resolve a process by which larger numbers of faculty could join in with relative ease to bring the project faculty-wide.

When these data sources—the student survey, faculty survey and documenting—are taken together, this curriculum mapping initiative is a start to offer the faculty the evidence required to decide whether it wants to revise and enhance the law school curriculum from a “best practices” perspective.

A. *Surveys*

Through our initial meetings, we discovered that surveying our students and faculty was an important part of understanding our curriculum. Yearly questioning of graduates is a common practice in the education field to help determine whether established programmatic goals were accomplished from

the perspectives of both faculty and students.¹⁰⁹ Our surveys were created in an educationally sound process. Throughout the spring of 2008, we generated possible questions for both students and faculty, considering what information we might find useful. Each set of questions was then separately sent to our consultant who, in conjunction with his graduate students and colleagues studying curricular design, evaluated the questions for face validity, educational usefulness, and made edits and suggestions. In the summer, we first administered the student survey, followed by the faculty survey in the fall.

At that point we had a “pilot” or draft survey. For the student survey, we selected approximately ten third-year students—about to be graduates—and recent graduates, and sent them the survey. We asked them to answer it as they would if it were sent to them in its final version, and to separately comment on the questions by highlighting anything they found confusing or repetitive, or noting information that they thought or wished would be asked of them. After sharing these results with our consultant, reviewing all responses, and making clarifications, the student survey was ready for implementation. Next, we repeated this process with the faculty survey. We used additional members of the curriculum committee to provide feedback on the faculty survey, and through this extended commenting process, produced a final survey ready for dissemination to the entire faculty.

1. Student Survey

An integral element of any curriculum reform initiative is data derived from student input. Such student input, in combination with our data, can help us devise our goals by which we evaluate our documenting data. This survey was implemented in August 2008, immediately following the July iteration of the bar exam. The survey was administered online, on a voluntary basis to our recent class of graduates only. It was primarily designed to uncover the strengths and weaknesses of the curriculum from a student perspective. The instrument was a combination of open-response and fixed-response questions.

The survey was designed to reveal candidate background data, their level of satisfaction with various law school experiences, their confidence in their abilities in different areas of professional practice, their level of preparation for the bar exam, and their future professional plans. For example, one set of questions specifically dealt with the use of technology in courses at the law school. The aggregate responses from this section of the survey

109. See, e.g., NEAG SCH. OF EDUC., U CONN. 2007–2008 ANNUAL REPORT 122 (2008).

will be critical in helping faculty consider ways in which technology should be implemented in our curriculum.

It is anticipated that the survey will be administered to graduates on a regular basis to establish trends over time as a routine element of the curriculum mapping efforts ongoing at the law school.

Although the committee requested that we administer the survey through an independent commercial website,¹¹⁰ we were required by our university administration to use the university's polling platform, Opinio. Although we had excellent support from our in-house contact, the site experienced multiple problems, from not being available online the day we were to receive a demonstration, to producing a collection of raw data—rather than a report—that needed quite a bit of editing to be presentable.

Recent graduates were contacted by e-mail in June 2008, alerting them of the survey's existence and asking them to complete it in August 2008 after the completion of the Bar exam. In August 2008, recent graduates were contacted with the link to the survey, and were given an explanation of the purpose of the survey. Two weeks later, we resent the link, with a reminder of the survey and of the anonymous nature of the information gathering. After one more reminder early in the fall semester, we had enough information to assemble a report.

We sent the survey to 256 recent graduates. When we closed the data, we had 131 stored responses to the survey, including 89 completed responses, meaning that some students began the survey but only completed portions of it. Thus the partial completion rate was 51% and the full completion rate was 34.7%. While not ideal, it is statistically significant enough for us to examine the data. We attribute our completion rate to several factors:

1. Students have not been frequently surveyed at NSU Law. At some institutions, all students are surveyed yearly, creating a culture of feedback in which the students expect to participate.

2. Because the platform for completing the survey was an "NSU" platform rather than that of an outside entity, there may have been some concern about the anonymity of the responses.

3. Unlike many institutions, we did not offer any outside incentive to complete the survey.¹¹¹ Many institutions invest a small amount of money in giving a prize—such as an iPod or gift cards—for which all participants may register and have a chance at winning.

110. The cost for a year's subscription for unlimited surveying was approximately \$300.

111. See Allan H. Church, *Estimating the Effect of Incentives on Mail Survey Response Rates: A Meta-Analysis*, 57 PUB. OPINION Q. 62, 63 (1993).

We uncovered some general themes from polling our students. First, we determined that most of our students described themselves as “moderately” or “very” satisfied with all areas of their law school experience regarding learning, such as the overall learning environment, quality and relationship with faculty, and the amount that they learned. This information told us that with a generally satisfied student body, decisions about curricular change should be refining and probably not sweeping.

Another discovery we made through the poll was that a majority of students reported that they were getting similar messages from various faculty they encountered about the curriculum. We asked students whether the messages about the curriculum that they received from faculty they encountered throughout their law school careers, relating to difficulty of coursework, importance of the Bar exam, and importance of ethics, among other areas, were different or similar. The reporting that students were getting a fairly consistent message helped us shape our upcoming faculty survey, as we went into that process with the understanding that we seem to have a faculty actively engaged in our curriculum. This evidence-based gathering of information was far more useful to us than trying to guess what the impact of the faculty on students could possibly be.

A further area in which we queried students was on their beliefs of how prepared and confident they were after graduation regarding specific skills taught throughout the curriculum, such as communicating verbally or in writing to a variety of audiences. We hope to be able to use this feedback as we administer more iterations of this survey and bring the curriculum discussion to the faculty on a larger scale.

One last set of data collected was regarding students’ beliefs in how the law center prepared them for the bar exam. As bar passage rates have become the topic of discussion and concern among law schools, this information can be very useful, when combined with the mapping, if the faculty chooses to consider specific revisions to these core courses in the future.

2. Faculty Survey

The law school faculty survey was designed to reveal various perspectives on the curriculum by those who are charged with implementing it. This source of data may often be overlooked in a curriculum mapping project, but was believed to be essential to provide the law school with a snapshot of our collective experiences and beliefs about fundamental curricular and instructional issues in order to help us set our goals by which we could evaluate data collected through the mapping. As noted, working with an external consultant, the survey was created and piloted in the summer of 2008 and implemented in the fall of 2008.

The instrument was a combination of open-response and fixed-response questions. Primarily designed to uncover our faculty's knowledge, attitudes, and behaviors regarding issues underpinning the design and implementation of the curriculum, the survey also sought to uncover how faculty allocate their professional time, their overall vision for the trajectory for the law school, and their beliefs about the relative importance regarding the educational mission of the law school.

Fifty-three faculty members responded to the survey, a response rate of approximately ninety-five percent. For this survey, we used a commercial web-based survey platform via the curriculum consultant, SurveyMonkey.com.¹¹² While the platform produced data that was easier to use for reporting, we experienced some technical problems as faculty members tried to enter certain kinds of data, such as fractions of hours spent on an event, in response to a question that asked for a time commitment. The following is some information regarding our faculty responses. Not every respondent answered every question, as is reflected in the data below.

These questions were designed to reveal a variety of interests, experiences, and attitudes. NSU Law has always informally designated itself as a "teaching" school—a place where faculty members heavily concentrated on, and are proud of, their focus on instructional design and teaching. The responses to the survey supported that assertion, as we discovered that as a whole, our faculty members dedicate the majority of their time to teaching activities, whether in the classroom or preparing for teaching. This scenario was encouraging for proceeding with the documenting step, as we knew we had a faculty engaged in the curriculum.

Second, the specific questions on curriculum gave us a picture of a faculty who are not hungering for radical change, but who are open to discussing reasons why they might consider a change. A majority of respondents agreed in some way that the curriculum currently met the needs of our students, however, paradoxically, also believed that the curriculum needed improvement. Interpreting these conflicting signals led us to the conclusion that the faculty believes our curriculum is solid, but that it could be better, which is a positive frame of mind when undertaking a mapping project.

Lastly, because it was so important to head into a curriculum mapping project with a cooperative and energetic faculty, one measure we wanted to take was the overall feeling of the faculty. The survey generally showed us enthusiasm and interest in being a part of a program that was doing good things for students, and that was encouraging for the project to forge ahead.

112. SurveyMonkey, <http://www.surveymonkey.com/> (last visited Feb. 21, 2010).

B. *Curriculum Mapping (Documenting) Pilot*

With the stage set, the curriculum committee decided to begin the data collection process of documenting the curriculum of the law school. However, as getting a law faculty on the same page has often been compared to “herding cats,” we decided that before we involved fifty-plus academics in a joint activity, we wanted to “test run” the documenting of a law school curriculum. In addition, resources have advised that one specific discipline should be selected to start the mapping process, rather than attempting all areas at once.¹¹³ Programs starting curriculum mapping should be aware of several potential pitfalls of the process. These include the fact that curriculum mapping is a time-consuming task involving a lot of hard work, that many faculty may not have clearly defined goals that they can articulate, that many faculty may not be interested in the process, and even that teachers within the same subject may not use the same vocabulary describing their subject taught.¹¹⁴ These and other concerns were part of the reason we chose to pilot the program, to work through some of these issues, so that we could present to our faculty a real picture of how to accomplish this task.

For the fall of 2008, we planned a pilot mapping effort—a one-semester “proof of concept” trial period which would potentially lead to a full-scale project across key areas of the law school. Two sections of Contracts courses and one section of Torts courses served as the context for the pilot study in the fall of 2008.

The documenting effort that we were piloting used the first several phases from Jacobs, designed to unfold at three levels.¹¹⁵ The first level to which we committed had individual instructors completing a “time sheet” following each class.¹¹⁶ This timesheet is called the *CourseMap* process and is designed to be *reflective* but *not analytical*. This form was designed to capture the actual delivery of curriculum on a class-by-class basis, as opposed to the *intended* curriculum as outlined in the course syllabus. Such a distinction is essential to produce an accurate database of knowledge, skills, and habits of mind explicitly taught within the context of course work at the law school. Schools also may make a projection map or pacing guide, which

113. See HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 113.

114. See Curriculum Mapping, What Is It?, *supra* note 17.

115. See JACOBS, *supra* note 10.

116. See *infra* Appendix A, B.

is a tool that projects what will be covered in the future in a program, but a curriculum map, at its heart, is a record of implemented instruction.¹¹⁷

The second level of the mapping pilot is the generation of *MicroMaps*.¹¹⁸ These maps are generated by faculty working together in a given specialty area. The first stage in creating *MicroMaps* is to analyze the *CourseMaps* from the entire semester with an eye toward identifying any inconsistencies and deviations from the intended syllabus. Faculty are not encouraged to “correct” or alter the differences between the *CourseMaps* and syllabus at this point, but rather merely document them, if they exist.

Next in this level, faculty from a given program area come together to discuss their documenting with the explicit aim of identifying and updating their learning goals for the course or courses in the specialty area. As we had two Contracts sections but only one Torts section, we continued through the next steps with our Contracts *CourseMaps*. For purposes of this pilot, we used the substantive Contracts law as tested on the bar exam as our learning goals/guide for the course. We analyzed our course maps together to see if any differences in coverage existed between the two sections of Contracts taught, and also to see the two sections’ alignment with the Florida and Multistate Boards of Bar Examiners’ testing areas. While we did use this bar exam testing outline as our goal by which to analyze our course map, it is important to understand that a faculty member or group of faculty members teaching any particular course could set their *own* goals for course coverage and analyze their course maps on that framework.

No matter where or how the goals were set, this stage of analysis is full of discussion and analysis by the faculty teaching that course who participated in the documentation. While our groups of faculty teaching the same courses have met in the past, the discussions were freeform. By comparison, in these sessions, our experiences documenting gave us hard data by which to productively discuss the similarities and differences in our courses on the same topic. Rather than merely an anecdotal sharing, the group creation of a *MicroMap* guided the discussion, as we used evidence of actual teaching practices that we gathered in the *CourseMap*. When done on a large scale, the very process of collectively generating a *MicroMap* will offer some faculty the first complete and accurate look at their own curriculum as it is actually delivered.

117. See Curriculum Mapping, Curriculum Mapping Model, http://www.curriculummapping101.com/Curriculum_Mapping.html#Curriculum%20Mapping%20Model (last visited Feb. 21, 2010).

118. See *infra* Appendix C.

It is important to note that “similar courses” for purposes of faculty discussion could be either “horizontal” or “vertical” within the curriculum.¹¹⁹ For example, in the field of Contracts, horizontal analysis may include all faculty who are teaching first-year Contracts, and a vertical analysis may include all faculty who are teaching first-year contracts, UCC: Sales, Remedies, and any other courses, in which data revealed that they shared common doctrine. Horizontal discussions may be useful in a law school environment, to keep professors teaching the same groundwork courses, apprised of what students are building in their first level of education, while vertical alignment can be very helpful to allow teachers to assess what substantive material or skills were taught in previous courses in which students were enrolled, and make informed decisions about whether such material needed to be reviewed or whether such repetition was unnecessary.¹²⁰ In other words, the opportunities are plentiful for faculty to group and regroup to analyze what and how information is taught to their common groups of students.

Such a *MicroMap* marked the end of the pilot project, and a point at which a larger-scale faculty participation was ready to be considered. A full-blown mapping project at the law school would involve the third, and final, level of curricular review once each specialty area completed their work at the *MicroMap* level. Representatives from the various specialty areas could come together to generate a *MacroMap* for the entire school. Such a document would offer a year-by-year perspective on the law school curriculum in its entirety. It would tell the unique curricular story of the law school while offering faculty, administrators, technology support staff, and others an evidence-supported position from which informed decisions could be made about our curriculum. For example, with a working knowledge of the actual curriculum in year one and newly refined objectives, faculty could plan for learning outcomes in subsequent course work and clinic experiences to support those core concepts and ensure students receive the knowledge, skills, and experiences in a coherent and well articulated fashion aligned with best practices in legal education. Such a process would allow our faculty to work as a coordinated body of professionals working toward a public and well documented set of program goals consistent with the best practices of legal education today.

119. See Teaching Today, A Curriculum Mapping Primer, <http://teachingtoday.glencoe.com/howtoarticles/a-curriculum-mapping-primer> (last visited Feb. 21, 2010).

120. *Id.*

C. *Fall 2008 Experiences*

With the general understanding of curriculum mapping, and after specific training and planning for the process, we began our pilot program in fall 2008. Three professors teaching two different courses—two Contracts, one Torts—completed course maps during the semester and, through trial and error, worked out a system for efficient documentation of time within the law course framework. This accomplishment was time consuming, frustrating, and yet, ultimately rewarding. We began with the concept that, as lawyers, we were all familiar with the “time sheet” process.

The first step was that we set up a timesheet to document what and how we taught in our classrooms.¹²¹ The original timesheet we created had five columns.¹²² The first was for time spent on an activity. We originally decided to keep “lawyer-like” timesheets, dividing hours into tenths—by documenting in six minute increments, like many of us had done in law firms. The problem we immediately encountered was that we had different definitions of what an “hour” was in the classroom—for some of us, we taught in one seventy-five minute block, with breaks or straight through; for others, we taught in two-hour blocks, some with breaks and some straight through; for others, a fifty minute class was an entire “hour.” Because we could not agree that sixty minutes was a true “hour,” we quickly abandoned this method in favor of just reporting the absolute number of minutes spent on an activity or subject, rather than fractions of an hour.

The second column we created was a place to list different teaching activities in the classroom via an activity code. This list of “activities” grew throughout the pilot program, as we lived through the documenting process and realized that our initial brainstorm of codes did not begin to cover what it was we actually did in the classroom. Our list of codes *initially* included the following:

- ADM — Administrative matters relating to the class such as meeting time, etc.;
- LEC — Lecturing law;
- SM — Time spent leading one or more students in discussion or synthesis of statutory or case law through questions;
- PRP — Professor reviewing practice problems; and

121. Our initial timesheet and our final product from the Fall 2008 pilot are included in this article as Appendix A and B.

122. See *infra* Appendix A.

SPP — Students independently working on review/practice problems.¹²³

But eventually, by the *end* of the fall pilot, it became the following list:

L — Lecture;
 SD — Socratic dialogue;
 SP — Student presentation;
 SLA— Simulated lawyering activity; and
 GA — Group activity, i.e., students doing something in groups.¹²⁴

The next column we created in the original timesheet was a place for a “Classroom Tool Code.” A classroom tool was our idea of a way to document if we used any technology in the classroom, so that we could track what that use was, including both higher-tech, such as PowerPoint, video, internet, as well as low-tech, such as merely writing on the whiteboard, which in many law classes is not even used. Our list evolved to the following:

WB — White board;
 PP — PowerPoint or similar presentation tool;
 IC — Interactive computer activity; and
 TV — Use of television, or computer, to show clip, movie or the like, i.e., not interactive by means of technology.¹²⁵

The next columns we used to document our teaching evolved through the piloting of the program. Originally, we only captured the subject matter taught, but through the discussion and feedback process we had as we were completing the documenting pilot, part-way through the semester we added a column called “Skills Being Taught.” We decided, after reflection, that not all time spent in the classroom was exclusively dedicated to covering a certain amount of substantive material, but rather to help impart certain skills to students, that it was important to document this coverage as well as the traditional substantive matters, and that more than one skill could be covered at once. Our list was as follows:

CA — Case analysis;
 PS — Problem solving;
 OA — Oral advocacy;

123. *Id.*

124. *See infra* Appendix B.

125. *See infra* Appendix B.

- LW — Legal writing;
- DD — Document drafting;
- S — Synthesis of the law from cases;
- ST — Use and interpretation of statutes;
- LS — Litigation skills;
- N — Negotiation;
- I — Interviewing;
- MCT— Multiple choice test-taking;
- ETT — Essay test-taking; and
- BEP — Bar exam preparation.

For some of us, this column required the most thought into what we actually were doing in the classroom. As we set the goal of completing these timesheets, almost immediately upon exiting the classroom, it was very easy to think back and remember that you covered a certain portion of the syllabus or the casebook. However, thinking about what *skill* students were learning really required a careful consideration of the classroom time spent. We found this to be one of the most valuable parts of the documenting as we were thinking about our teaching on more than one level. We found that even thinking about documenting skills that students learned in the classroom made us more aware of this aspect of education, and encouraged us to ensure that we were working with our students on skills as well as substantive coverage. We all believe that our students benefitted from our heightened awareness.

As for covering the subject matter, we decided that rather than either writing the subject matter in our own words—which may or may not coincide among teachers on topics—or trying to evolve our own common language of a subject matter, that we would use an objective, outside list of topics from the course to unify what we covered in our documenting. For example, in Contracts, both of the professors piloting the program began the course with formation of contracts. However, if we tried to use our own language, one of us might describe an entire four-week unit as “formation,” while another might break it down to “mutual assent” and “offer and acceptance;” even further, to “offer” and then separately “acceptance;” or even further, to “acceptance by conduct” or “bilateral acceptance.” The permutations were too great to attempt to control. As both professors taught from the same book, we also considered using the book’s table of contents as a guide, but we were concerned with the implications for the future, should the mapping project be utilized by the entire faculty, including others who may use other textbooks for the same subject. We did not want to tie the documenting project to a lexicon from which one or more professors would be excluded.

We finally settled on using the topic of subjects from the Multistate Bar Examiners' outline. This list had several benefits and drawbacks. The first benefit was that it was universal—not only could all Contracts teachers eventually use this outline, but it also could be a resource that, as the program grew, other faculty in other subject areas might draw on. Our colleague piloting the Torts documenting also drew on the Multistate Examiners' outline, with success. The second benefit to using this outline was that the list of topics was comprehensive for the course. There were few, if any, topics we encountered, and that we taught, which were not on the bar list. However, there were some drawbacks to this list. First, the outline of topics and our foci did not always match up. Places where we might have wanted more detail in subtopics were grouped together, while in other places in the outline, there were extensive subdivisions of topics that were not relevant to us. In addition, sometimes the terms used in describing parts of the law were not identical to the terms we used in our classroom; however, that in itself was part of our educational process of working together.

The list of topics, as per the bar examiners' outline, is included in Appendix A and Appendix B, as we used them in our timesheets. The subject matter documenting became perhaps the easiest part of the course. We used the outline numbering to quickly drop in the code of the subject matter, again, keeping the list as part of our timesheet template for easy referral.

The last column we created was a free written space for any additional information that we wanted to include. Sometimes this space was used for further subdividing topics when the subject matter code did not allow us to clarify exactly what it is that we taught. Other times, we made additional notes about what we did, just to have the clearest record of our time spent in the classroom.

Once we had finished our timesheets for the semester (one per class), we had our own individual *CourseMaps*, and were ready to begin the next phase. Through various sessions together, we took our two *CourseMaps* for the Contracts courses and tried our hand at creating a *MicroMap*—a product demonstrating the consistencies and inconsistencies between the individual products. While this tool, in a more widespread project, would ultimately be used as the basis of analysis by a group of faculty members to evaluate what is taught and how it is taught,¹²⁶ we had no plans to carry it through that far with the pilot. At this stage, we were simply creating the *MicroMaps* to see what method might work for us in the law school environment and what information we obtained from their creation. We created a week-by-week *Mi-*

126. See UDELHOFEN, *supra* note 3, at 53–54.

croMap through the first several weeks of the course, and the result for week one is presented in Appendix C.

To create this *MicroMap*, first we combined our timesheets onto one form, in a week-by-week format. To do that, we listed each professor (in this pilot, only two) one after another using the same template from our original forms; but here, using a different color to enter the information for *each* professor on the same form, so that we had a one-glance snapshot of each week's activities—what the coverage of skills and content was for each professor during the same time period—a detailed picture of how we had each spent the minutes allotted to us in the Contracts classroom each week. We completed four weeks' worth of these week-by-week combinations before determining that this was a feasible and useful process. We also determined that we could easily add more professors by extending the chart and adding additional font colors.

From that point, we decided to further summarize the material and see in what ways we could analyze it to get additional levels of understanding of what was happening in the contracts classrooms across the sections piloted. One useful format we developed was a person-by-person accounting only by substantive coverage, included here in Appendix D. We found this summary of coverage, using the original codes by which we did timekeeping, useful and easily expandable for when others participated by merely adding columns to the right, including each additional faculty member. A quick glance at this document—which we only prepared through the first four weeks—told us what was being taught in multiple classrooms in our first-year contracts program. We completed a similarly formatted map for the skills taught and found that equally as useful.

At this point, we felt confident that our methodology was sound, and that the information we produced had the potential to be very useful in facilitating faculty discussions. When these exercises were complete, we truly felt that we had accomplished a great deal by piloting this program. Our goal was to work through the program so that we could present curriculum mapping to the faculty, demonstrate what it is and how it works, and, as a direct result of piloting the program, tangibly demonstrate that documenting courses was something that could be done.

Such results did not come completely without effort or challenge. The first hurdle we crossed was merely remembering to complete the time sheets as quickly as possible. Anyone who has tried to document the time spent on a work project can appreciate that the sooner you document your time, the more accurate the timesheet. However, it was not always possible to complete them immediately. First, right after class is the time many students ask questions or seek your time. Second, one professor ended class at noon and had another class immediately again at 1:00 pm. In that hour, it was difficult

to remember to complete the timesheet among the other things that needed to be done. Another professor taught at night, and when the class was completed at the end of a very long day, staying longer to think about a timesheet often was not possible.

Another difficulty was that we were constantly monitoring our timesheet and methodology, and adjusting it from the appearance in Appendix A to the last product we used in Appendix B. We had dozens of conversations weekly about our timesheets and made small adjustments—sometimes adding as little as one code each week—and evaluating how these changes worked out. This process made us very glad that we completed a pilot. Having forty or more faculty members involved in working out the methodology would have been problematic on two levels.¹²⁷ First, it would have been difficult to come to a meaningful resolution of issues with so much potential input.¹²⁸ Second, and probably more important, it could have been very discouraging to a large group of faculty, many of whom might have been resistant to the program, to be constantly changing the process as they were undergoing it.¹²⁹ Instead of a potentially confusing ever changing task, when speaking with the faculty, we could now present a procedure for mapping that we could demonstrate worked, increasing confidence in the project. Another reason that the pilot was challenging but ultimately rewarding, was the complication in trying to produce a *MicroMap* for the first time, faced with pages of timesheets and an uncertainty as to how to combine them. As this was our first experience in creating a *MicroMap*, it was far easier to leap to this next phase with only two *CourseMaps*, and through trial and error produce a format that seemed useful. Had we struggled with more than two *CourseMaps*, this process surely would have been more complicated to complete.

D. *Taking the Program to the Next Level*

Once our pilot of documenting for the fall semester was complete, we decided to take two steps to further the program. The first was to continue the pilot through the next semester, implementing the lessons learned from fall, and expanding it to a few new faculty members who were all teaching Property.¹³⁰ This continuation of documenting on a smaller scale would assist us in ensuring that what we had accomplished in the fall could work for

127. See UDELHOFEN, *supra* note 3, at 23, 25.

128. See *id.*

129. See *id.*

130. One professor from the Contracts pilot also taught Property and led the continuation of the pilot.

other courses, as well as bring other faculty members on board to the experience.

The second step was to present curriculum mapping to the entire faculty, which we did on April 1, 2009, via a lunchtime presentation. The presentation had several parts. First, before the actual presentation, and with the help of our consultant, we prepared a written summary of curriculum mapping and distributed it to the faculty to read in preparation for the presentation. This summary included both a basic introduction to curriculum mapping and an explanation of what we had been doing through our surveys and fall pilot.

For the presentation, the two faculty members who had spearheaded the pilot presented curriculum mapping to the remainder of the faculty, using a combination of PowerPoint slides, lecturing, and handouts. One item that we left out of the presentation was the results of our surveys. We were concerned that the results would become the focus of the discussion rather than the idea of curriculum mapping as a whole, and getting the faculty interested in the documenting process on a larger scale. The results of the survey were distributed electronically after the program.

After we presented our information, we opened up the floor to questions and concerns. One significant concern by some faculty members was the potential evaluation of faculty members based on the information they revealed in the documenting process. The concern generally of those faculty members under contracts which needed to be renewed, or of untenured faculty members, was that the information they provided about what they teach and how they teach it could be used “against” them in their renewal or tenuring process. If other faculty members disapproved of their coverage or methods, they may consciously or unconsciously include what they learned through documenting to make such judgments about contracts or promotions.

Such concerns are not new and have been addressed by those in the field.¹³¹ It is clear that this type of tension and potential embarrassment must be resolved in order for the process to be successful.¹³² These concerns come in the context of understanding the overall relationship of teachers regarding working together on curriculum.¹³³ The different types of relationships that teachers’ work related behaviors regarding what sharing encompasses have been documented.¹³⁴ The first is “parallel play” relationships in which teachers function next to each other but do not share, nor wish to share, what they

131. See UDELHOFEN, *supra* note 3, at 23.

132. See *id.*

133. HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 8.

134. *Id.*

are doing with their colleagues.¹³⁵ We found heading into our mapping project that this scenario describes many law faculty, even those teaching the same subjects. A second type of teacher relationship is “adversarial,” where teachers purposefully withhold information from each other, even though it might be damaging to the student progress.¹³⁶ While we hope that we do not have that situation on the faculty, the competitive nature of a promotion could very well breed this type of behavior, thus leading to such concerns.

A third type, a “congenial” relationship among teachers, is one that is “friendly on the surface,” teachers interacting in superficially positive ways, but not critically examining what they do or why.¹³⁷ This situation can also describe a great deal of law faculty, and may also be fueled by the peer-review process that we have in place in the law faculty. If you are only sharing positive pieces of your work, your colleagues only can judge you on that shared information. This may be a disincentive for many junior faculty members to share their teaching on a critical level. But ultimately, our goal is to instead have “collegial” relationships among our faculty. This type of relationship is evidenced by teachers working together to advance *everyone’s* performance, with faculty “willing to sacrifice and learn anew” to improve students’ learning.¹³⁸

To reach this collegial stage, it is crucial that when critically examining the curriculum, teachers focus on facts and data, and not on judging what is in the data collection based on personalities, personal beliefs, or personnel evaluation criteria.¹³⁹ Our dean was present at our mapping presentation and strongly expressed that the information collected was not to be part of the faculty review or renewal process. Despite that assurance, there were lingering concerns that while a policy could be set to control that sentiment formally, it could not be controlled from being used informally.

A second concern by the faculty was the amount of time needed to document courses. It is documented that “curriculum mapping requires more time and effort during the first few years of implementation than in later years when mapping becomes established and embedded in the academic and social cultures.”¹⁴⁰ Each of the faculty members involved in the fall and spring semesters piloting were quick to reassure colleagues that while remembering to complete the timesheet was occasionally an obstacle, the actual completion of it was neither difficult nor time consuming. Each profes-

135. *Id.*

136. *Id.*

137. *Id.*

138. HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 8.

139. UDELHOFEN, *supra* note 3, at 40.

140. HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 250.

sor involved in the project independently concluded that while the first few took a little longer, it took approximately five minutes to complete the time-sheet after becoming familiar with the codes.

To ensure a smooth transition to a full faculty mapping project, it is important that we help the faculty fully understand why they are completing this project. Teachers need to see that mapping can help improve student learning, and thus can help with their own teaching.¹⁴¹ This knowledge and understanding needs to happen early in the process to ensure success.¹⁴² An action plan for how the project is going to play out over a set period of time can help to accomplish that goal.¹⁴³

One additional stumbling block that we encountered was the fact that while curriculum mapping software has been strongly recommended, it appears that most is designed for the K–12 or undergraduate platforms.¹⁴⁴ To date, we have developed our own charts and forms to complete our *Course-Maps* and *MicroMaps*. The next big step will be, when we have a significant enough number of *MicroMaps*, to begin creating *MacroMaps*. We will need to regroup as a pilot or committee in order to decide how to accomplish that step.

After the presentation to the faculty, no formal decision or vote was taken on the project, but with the dean's support and encouragement, the project is going forward in the fall. At this point, the project will include the professors from all sections of the three non-writing courses in first year—Contracts, Torts, and Criminal Law. Two of the three courses are taught by faculty who have piloted the program, and will be leading their colleagues through it. Others from the pilot program will assist the professors in the third class.

V. CONCLUSIONS

Curriculum mapping is an important tool and process to help a faculty both to understand what they really do in their teaching, and to give them evidence to help decide if they want to or need to make changes to make their program as a whole the best that it can be. During our presentation, one faculty member in support of the program analogized it to a “system analysis” of our program and encouraged everyone to participate.

141. *Id.* at 252.

142. *See id.*

143. *Id.*

144. *See UDELHOFEN, supra* note 3, at 28, 58–59.

In addition, curriculum mapping is an empowering tool, helping all teachers be leaders in the curriculum they deliver.¹⁴⁵ Because all teachers are potentially leaders, they can look to each other to solve any problems together as a team, rather than delegating that task.¹⁴⁶

We believe that engaging in curriculum mapping will help us in a variety of ways, some of which have already have been accomplished. Our first goal, which we believe has been accomplished, was to open a dialogue about our curriculum. Before we started this project, we had an informal faculty gathering in which we talked about whether to change the first-year curriculum. There were conflicting ideas about whether to change—from there being no reason to change to wanting to change—but for a variety of different reasons. What we did not have, we discovered, was a great deal of conversation about what we were really doing in that first-year curriculum and what we really wanted to accomplish. We believe curriculum mapping has effectively started that conversation.

Second, we believe we are joining the growing community of legal educators who believe that a law school curriculum is not a static thing, dictated by its own model of precedent. We believe that we have demonstrated how a tool used in other areas of education can be used effectively in legal education to help support the voice of reform with evidence-driven data.

In the future, we anticipate that curriculum mapping will help to continue this curriculum conversation, by providing evidence of where we are, and by serving as a tool for analysis to help us determine where we want to go—if we want to go. We are in for a long process of self discovery, but we are now confident that we have taken steps to provide ourselves with the process we need to succeed.

145. HALE, A GUIDE TO CURRICULUM MAPPING, *supra* note 1, at 1.

146. *Id.*

APPENDIX A
INITIAL TIMESHEET IN PILOT PROGRAM FALL 2008

Curriculum Mapping Timesheet

Course: Contracts

Professor: Brown

Semester: Fall 2008

Date: 8/14/08

Class Number 1 of out 27

TIME CODE	ACTIVITY CODE	CLASSROOM TOOL CODE	SUBJECT MATTER DISCUSSED	ADDITIONAL DESCRIPTION OF CLASSROOM ACTIVITY DURING THIS TIME
50 min	Sm	None	I. A. Formation of Contracts - Mutual Assent	Case analysis of first case
50 min	ADM	None	Introduction to law school and to this course	Reviewed syllabus, rules, goals, methods and role of students and professor in this course

Curriculum Mapping Timesheet Codes

Time Codes: Division by Quarters of hour

.25, .5, .75, or 1 hour

Activity Codes: Choose the code which most closely describes the classroom activity for that time period

ADM = Administrative Matters relating to the class such as meeting time, etc.

LEC = Lecturing Law

SM = Time spent leading one or more students in discussion or synthesis of statutory or case law through questions

PRP = Professor reviewing practice problems

SPP = Students Independently working on review/practice problems

Classroom Tool Codes: Choose the code(s) for which classroom technology used during that time period

WB = Whiteboard
 PP = Powerpoint
 DVD = DVD or video or other multimedia

Subject Codes

- I. Formation of contracts
 - A. Mutual assent
 1. Offer and acceptance
 2. Mistake, misunderstanding, misrepresentation, nondisclosure, confidential relationship, fraud, undue influence, and duress
 3. Problems of communication and “battle of the forms”
 4. Indefiniteness or absence of terms
 - B. Capacity to contract
 - C. Illegality, unconscionability, and public policy
 - D. Implied-in-fact contract and quasi-contract
 - E. “Pre-contract” obligations based on detrimental reliance
 - F. Express and implied warranties in sale-of goods contracts
- II. Consideration
 - A. Bargain and exchange
 - B. “Adequacy” of consideration: mutuality of obligation, implied promises, and disproportionate exchanges
 - C. Modern substitutes for bargain: “moral obligation,” detrimental reliance, and statutory substitutes
 - D. Modification of contracts: preexisting duties
 - E. Compromise and settlement of claims
- III. Third-party beneficiary contracts
 - A. Intended beneficiaries
 - B. Incidental beneficiaries
 - C. Impairment or extinguishment of third-party rights by contract modification or mutual rescission
 - D. Enforcement by the promisee
- IV. Assignment of rights and delegation of duties
- V. Statutes of frauds
- VI. Parol evidence and interpretation
- VII. Conditions
 - A. Express
 - B. Constructive
 1. Conditions of exchange: excuse or suspension by material breach
 2. Immaterial breach and substantial performance
 3. Independent covenants
 4. Constructive conditions of nonprevention, non-hindrance, and affirmative cooperation
 - C. Obligations of good faith and fair dealing in performance and enforcement of contracts
 - D. Suspension or excuse of conditions by waiver, election, or estoppel
 - E. Prospective inability to perform: effect on other party
- VIII. Remedies

- A. Total and partial breach of contract
- B. Anticipatory repudiation
- C. Election of substantive rights and remedies
- D. Specific performance; injunction against breach; declaratory judgment
- E. Rescission and reformation
- F. Measure of damages in major types of contract and breach
- G. Consequential damages: causation, certainty, and foreseeability
- H. Liquidated damages and penalties
- I. Restitutionary and reliance recoveries
- J. Remedial rights of defaulting parties
- K. Avoidable consequences and mitigation of damages
- IX. Impossibility of performance and frustration of purpose
- X. Discharge of contractual duties

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APPENDIX B
FINAL FALL 2008 PILOT TIMESHEET

Curriculum Mapping Timesheet (version 4)

Course: ContractsProfessor: Ron BrownSemester: Fall 2008Date: 12/2/08Class Number 27 of out 26 (an optional extra class)

1	2	3	4	5	6
TIME (MINUTES)	TEACHING METHOD	CLASSROOM TOOL	SKILL BEING TAUGHT	SUBJECT MATTER	ADDITIONAL DESCRIPTION OF CLASSROOM ACTIVITY
100	SD	WB + paper handout with mul- tiple choice questions	MCT	Review touching on most topics	Sample multiple choice exam ques- tions were used to teach test-taking skills and review course material

Explanatory CODES and notes:Column 2. *Teaching Method*

L – Lecture

SD – Socratic dialogue

SP – Student presentation

SLA – Simulated lawyering activity

GA – Group activity, i.e., students doing something in groups

Column 3. *Classroom Tool*

WB – White Board

PP – powerpoint or similar presentation tool

IC – interactive computer activity

TV – use of television (or computer) to show clip, movie or the like,
i.e., not interactive by means of technology.

Column 4. *Skill Being Taught* (more than one simultaneously is ok)

- CA – Case analysis
- PS – Problem solving
- OA – Oral advocacy
- LW – Legal writing
- DD – Document drafting
- S – Synthesis of the law from cases
- ST – Use and interpretation of statutes
- LS – Litigation skills
- N – Negotiation
- I – Interviewing
- MCT – Multiple Choice Test-taking
- ETT – Essay Test-Taking
- BEP – Bar exam preparation

Column 5. *Subject Matter*

Reference will be to outline of subject matter by indicating the numbers & letters of the section, e.g., I.B.2

Subject matter outline of CONTRACTS

- I. Formation of contracts
 - A. Mutual assent
 - 1. Offer and acceptance
 - 2. Mistake, misunderstanding, misrepresentation, nondisclosure, confidential relationship, fraud, undue influence, and duress
 - 3. Problems of communication and “battle of the forms”
 - 4. Indefiniteness or absence of terms
 - B. Capacity to contract
 - C. Illegality, unconscionability, and public policy
 - D. Implied-in-fact contract and quasi-contract
 - E. “Pre-contract” obligations based on detrimental reliance
 - F. Express and implied warranties in sale-of goods contracts
- II. Consideration
 - A. Bargain and exchange
 - B. “Adequacy” of consideration: mutuality of obligation, implied promises, and disproportionate exchanges
 - C. Modern substitutes for bargain: “moral obligation,” detrimental reliance, and statutory substitutes
 - D. Modification of contracts: preexisting duties
 - E. Compromise and settlement of claims
- III. Third-party beneficiary contracts
 - A. Intended beneficiaries
 - B. Incidental beneficiaries

- C. Impairment or extinguishment of third-party rights by contract modification or mutual rescission
- D. Enforcement by the promise
- IV. Assignment of rights and delegation of duties
- V. Statutes of frauds
- VI. Parol evidence and interpretation
- VII. Conditions
 - A. Express
 - B. Constructive
 - 1. Conditions of exchange: excuse or suspension by material breach
 - 2. Immaterial breach and substantial performance
 - 3. Independent covenants
 - 4. Constructive conditions of nonprevention, non-hindrance, and affirmative cooperation
 - C. Obligations of good faith and fair dealing in performance and enforcement of contracts
 - D. Suspension or excuse of conditions by waiver, election, or estoppel
 - E. Prospective inability to perform: effect on other party
- VIII. Remedies
 - A. Total and partial breach of contract
 - B. Anticipatory repudiation
 - C. Election of substantive rights and remedies
 - D. Specific performance; injunction against breach; declaratory judgment
 - E. Rescission and reformation
 - F. Measure of damages in major types of contract and breach
 - G. Consequential damages: causation, certainty, and foreseeability
 - H. Liquidated damages and penalties
 - I. Restitutionary and reliance recoveries
 - J. Remedial rights of defaulting parties
 - K. Avoidable consequences and mitigation of damages
- IX. Impossibility of performance and frustration of purpose
- X. Discharge of contractual duties

APPENDIX C
WEEK BY WEEK MICROMAP

Week-by-Week MicroMap
Program Area: Contracts

WEEK #	NUMBER OF MINUTES	SUBJECT MATTERS	ACTIVITY CODE	CLASSROOM TOOL CODE	ADDITIONAL DESCRIPTION
1	55 50 110	--- I.A I.A.1	LEC SM SM	--- WB WB; DVD	<i>Overview of Course and Administrative Requirements Mutual Assent Offer and Ac- ceptance</i>
	50 50 120	--- I.A. IA1	ADM SM SM	--- --- WB	Introduction to Law school and Contracts Mutual Assent Mutual Assent, Offer and Acceptance, gap fillers, precedents, procedure

DMC
RBB

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APPENDIX D
SUBSTANTIVE COVERAGE MICROMAP

Curriculum Mapping
Fall 2008
Pilot Substantive Coverage

SUBJECT CODE	RBB (MINUTES)	DMC (MINUTES)
Introduction to Contracts and Course	50	55
I. Formation of contracts A. Mutual assent	50	50
I. Formation of contracts A. Mutual assent 1. Offer and acceptance	590	350
I. Formation of contracts A. Mutual assent 3. Problems of communication and "battle of the forms"	50	20
I. Formation of contracts A. Mutual assent 4. Indefiniteness or absence of terms	40	80
II. Consideration A. Bargain and exchange	70	45
II. Consideration B. "Adequacy" of consideration: mutuality of obligation, implied promises, and disproportionate exchanges	0	50
II. Consideration C. Modern substitutes for bargain: "moral obligation," detrimental reliance, and statutory substitutes	210	100
II. Consideration D. Modification of contracts: preexisting duties	50	35

COMPARATIVE ANALYSIS OF FLORIDA’S ADMISSIBILITY STANDARDS FOR MEDICAL CAUSATION EXPERT TESTIMONY UNDER *FRYE*: IS IT “GENERALLY ACCEPTED?”

NICOLE SAQUI*

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I. INTRODUCTION

This article will take a comparative look at the two dominant and widely accepted common law evidentiary standards applied by courts nationwide

* Nicole Saqui received her B.A. from Florida Atlantic University and is a J.D. candidate at Nova Southeastern University. Nicole would like to thank the Honorable Robert B. Carney of the 17th Judicial Circuit of Florida, Broward County Court, for his inspiration and guidance in selecting a topic for her article. She would like to also acknowledge the hard work and dedication of each of her fellow members of Nova Law Review. Lastly, Nicole would like to thank her family and friends for their continued love and support.

in order to determine the admissibility of expert testimony, specifically, testimony relating to medical causation. This article will analyze how these different standards are applied in various jurisdictions and will also analyze Florida's approach, which follows the initial standard which was set forth in *Frye v. United States*.¹ In 2007, the Supreme Court of Florida, in *Marsh v. Valyou*,² explicitly held fast to the adherence and application of the *Frye* test in Florida courts for the admissibility of medical causation expert testimony.³ However, many seem to believe that the substance of its decision seems to say otherwise.⁴

In an apparent effort to "to limit the admission of opinion [testimony] based on so-called 'junk science' or pseudo science,"⁵ the Supreme Court of Florida held in *Marsh* that expert testimony is subject to the stringent standard that was set forth in *Frye*, which requires the "general acceptance" in the relevant scientific community of the theory or methodology upon which the opinion is based.⁶ However, the dissent, in its opinion, diverged from the majority's rationale and pointed out that, although the majority claimed to be adhering to *Frye*, the fact that it found the expert evidence as to the medical cause of the plaintiff's condition, which had not been generally accepted by the relevant scientific community to be admissible is in complete contradiction with the *Frye* standard.⁷

This article will, in general, provide a synopsis of the current approach as to admissibility under Florida law and also provide insight as to the methods that have been adopted by other jurisdictions. Section II of this article will provide a brief history as to the two different widely accepted common law standards for the admissibility of expert testimony that have been set out by the District of Columbia Court of Appeals' decision in *Frye*, as well as the United States Supreme Court's subsequent decision, decided seventy years after *Frye*, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁸

Section III of this article will take an in-depth look at Florida's approach under the Supreme Court of Florida's decision in *Marsh*. Section IV of this article will then take a comparative approach, analyzing other jurisdictions' approaches regarding the application of their adopted standard to

1. 293 F. 1013 (D.C. Cir. 1923).

2. 977 So. 2d 543 (Fla. 2007).

3. *Id.* at 547.

4. *See id.* at 559–71 (Cantero, J., dissenting).

5. *Andries v. Royal Caribbean Cruises, Ltd.*, 12 So. 3d 260, 264 (Fla. 3d Dist. Ct. App. 2009).

6. *Marsh*, 977 So. 2d at 547.

7. *Id.* at 559–60 (Cantero, J., dissenting).

8. 509 U.S. 579 (1993).

medical causation testimony, under each of the widely accepted *Frye* or *Daubert* standards. This article will also discuss the federal courts' approach to expert testimony admissibility. Section V of this article will offer support as to why the Supreme Court of Florida should either explicitly deny the *Frye* standard and adopt a new standard of admissibility or adhere to the *Frye* standard by revisiting its reasoning in *Marsh* in order to clarify Florida's approach as to medical causation testimony.

This article will further explain the critical need for the Supreme Court of Florida to clarify its decision in *Marsh* because, as its decision is set forth, many seem to believe that Florida is currently without a clear common law standard for admissibility for medical causation expert testimony.⁹ Currently, more than three years after the court's decision in *Marsh*, there is still uncertainty as to the standard that should be applied in Florida.¹⁰

This article will conclude by finding that the Supreme Court of Florida's decision in *Marsh* has many questioning whether *Frye* is, in actuality, the standard that is used in Florida.¹¹ This article will also point out how some of the standards for admissibility are used in other jurisdictions and whether they could provide a clear and logical analysis for the Florida courts to follow.

II. THE FRAMEWORK OF COMMON LAW EVIDENTIARY STANDARDS

A. *The Dominate Standards*

The majority of the states have adopted one of the two most commonly recognized common law standards "for determining the admissibility of scientific evidence in court."¹² These standards have enabled the courts to apply a common law standard in order to determine whether scientific expert testimony should be admissible in court and ultimately heard by a jury.¹³ The theory behind both of the standards is to keep "scientifically unreliable testimony from reaching the trier of fact,"¹⁴ but the approach that is utilized

9. See E. Kelly Bittick, Jr., *Out of the Frye-ing Pan . . . ? The Florida Supreme Court Limits Frye Challenges to Medical Causation Testimony*, 27 No. 2 TRIAL ADVOC. Q. 8, 8 (Spring 2008).

10. See *Andries*, 12 So. 3d at 264–65 (overturning the trial court's decision that the unsupported evidence is subject to *Frye* and is inadmissible).

11. See Bittick, *supra* note 9, at 8.

12. Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5TH 453, 480 (2001).

13. See *id.* at 479–80.

14. Julia Luyster, *Frye and Daubert Challenges: Unreliable Options vs. Unreliable Science*, 26 No. 2 TRIAL ADVOC. Q. 29, 29 (Spring 2007).

under each different standard in order to satisfy this common purpose is considerably different.¹⁵

1. *Frye v. United States*: The “General Acceptance” Standard

Frye was the first case to set forth a widely accepted common law standard for determining the admissibility of scientific evidence and was therefore adopted by a majority of the states and by the other federal courts.¹⁶ The issue on appeal in *Frye* was whether the expert testimony as to the results of a systolic blood pressure deception test made upon the defendant should be admissible in a court of law.¹⁷ The court, in a citation-free decision in *Frye*, held that in order for an expert to testify as to a scientific principle or discovery it must be well-recognized and must have gained “general acceptance” within the specific “field in which it belongs.”¹⁸ The court set forth the “general acceptance” standard as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the *thing from which the deduction is made must be sufficiently established to have gained general acceptance* in the particular field in which it belongs.¹⁹

Under this standard the trial “judges are to survey relevant scientific literature, not for substantive content, but to determine the level of acceptance within the scientific community.”²⁰ “General acceptance is determined by considering ‘the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique.’”²¹ The “general acceptance” test was adopted and applied by a majority of the states and federal courts and was the dominant standard for over seventy years; however, after taking into con-

15. *Id.* Compare *Frye v. United States*, 293 F. 1013, 1014 (D. C. Cir. 1923) (requiring the evidence to be generally accepted within the relevant scientific community), with *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 580 (1993) (requiring the evidence to be both reliable and relevant as provided for under the Federal Rules of Evidence).

16. See Lustre, *supra* note 12, at 453.

17. *Frye*, 293 F. 1013 at 1013–14.

18. *Id.* at 1014.

19. *Id.* (emphasis added).

20. *Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *6 (Ariz. Super. Ct. June 1, 1998) (quoting *State v. Hummert*, 933 P.2d 1187, 1196 (Ariz. 1997)).

21. *Id.* (quoting *Hummert*, 933 P.2d at 1196 n.5).

sideration the enactment of Federal Rule of Evidence 702,²² the United States Supreme Court took a new approach as to the admissibility of expert testimony.²³

2. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*: The Gatekeeper

In the United States Supreme Court's decision in *Daubert*, the Court ruled that the standard set forth in *Frye* "was superseded by the [enactment] of the Federal Rules of Evidence"²⁴ and in light of such determination, the Court established a new common law standard to be used in order to determine whether novel scientific evidence should be admissible.²⁵ The standard under *Daubert* looks at the relevancy and reliability of the evidence that is proffered instead of its "general acceptance" and is described by the Court as being a more liberal standard.²⁶ The Court set forth its two prong standard stating:

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only *relevant*, but [also] *reliable*.²⁷

Although the Court ruled that the *Frye* standard was superseded by the Federal Rules of Evidence, it noted that a common law standard could never-

22. FED. R. EVID. 702 (amended 2000). The current version of Rule 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

23. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585, 587 (1993). "[Petitioners] contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree." *Id.* at 587; *see also* Lustre, *supra* note 12, at 481.

24. *Daubert*, 509 U.S. at 587.

25. Lustre, *supra* note 12, at 481.

26. *Daubert*, 509 U.S. at 587 (defining relevant evidence "as that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" (quoting FED. R. EVID. 401) (amended 2000)).

27. *Id.* at 589 (emphasis added).

theless serve as an aid or give guidance as to the application of the rules.²⁸ The Court pointed out that there is nothing in the text of the relevant Rule of Evidence that requires “general acceptance” as a factor the court must consider when determining whether the scientific testimony offered by the expert is admissible in a court of law.²⁹ Because the standard under *Frye* exclusively looked at “general acceptance” in determining the admissibility of scientific expert testimony, and the Rule of Evidence did not establish a standard resembling the *Frye* test, the Court held that *Frye* should not be applied in the federal courts.³⁰

The Court further stated that even with the displacement of *Frye*, there are still limits on the admissibility of scientific expert testimony, and it is the job of the trial judge to “ensure that any and all scientific testimony or evidence [that is] admitted is not only relevant, but [also] reliable.”³¹ This is the central theory of the standard that is now applied by the federal courts and any state that has adopted the *Daubert* standard.³²

The Court determined that the Rule of Evidence placed an obligation of “gatekeeper” upon the trial court judge by interpreting the very text of the rule which clearly proposes a degree of regulation on all scientific evidence provided by an expert witness before it can be considered admissible.³³ The Court specifically analyzed the terminology used in the rule in order to make the determination that: “the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability,” and the requirement “that the evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue’ . . . goes primarily to [the requirement of] relevance.”³⁴

The Court listed four non-exclusive factors that a trial judge acting as “gatekeeper” could take into consideration when determining the reliability of the expert’s testimony: “(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has

28. *Id.* at 587–88.

29. *Id.* at 588.

30. *Id.* at 588–89 (“The drafting history makes no mention of *Frye*, and a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion’ testimony.” (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988))).

31. *Daubert*, 509 U.S. at 589.

32. *See Lustre*, *supra* note 12, at 481.

33. *Daubert*, 509 U.S. at 589.

34. *Id.* at 587, 590–91. “[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., ‘good grounds,’ based on what is known.” *Id.* at 590.

attained general acceptance within the scientific community.”³⁵ The Court noted that “general acceptance” is one of the factors that can be considered by the trial judge when determining the reliability of the evidence proffered, but it “is not a necessary precondition” as it is under *Frye*.³⁶ Under this standard the trial court is viewed as a “gatekeeper,” and any and all scientific evidence must be considered in light of the “relevancy standard” set forth in *Daubert* in order to determine its admissibility.³⁷

III. FLORIDA'S APPROACH

The Supreme Court of Florida expressly adopted the *Frye* standard for the admissibility of scientific testimony in Florida courts³⁸ to be applied “when an expert attempts to render an opinion that is based upon new or novel scientific techniques.”³⁹ After the United States Supreme Court’s decision in *Daubert*, the Supreme Court of Florida reaffirmed its adherence to the *Frye* standard and did not adopt the approach taken by the United States Supreme Court in *Daubert*.⁴⁰ However, the Supreme Court of Florida held in its decision, *United States Sugar Corp. v. Henson*,⁴¹ that “[b]y definition the *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.”⁴² The court also noted that the *Frye* inquiry “must focus only on the general acceptance of the

35. *Id.* at 593–94; *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999); *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (“[T]he test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.”); *see also Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999).

36. *Daubert*, 509 U.S. at 594, 597.

37. *See id.* at 589, 591.

38. *See Marsh v. Valyou*, 977 So. 2d 543, 546 (Fla. 2007) (citing *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985); *Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989)).

39. *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002).

40. *See Marsh*, 977 So. 2d at 547 (citing *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006) (“Florida courts do not follow *Daubert*, but instead follow the test set out in *Frye*.”); *Brim v. State*, 695 So. 2d 268, 271–72 (Fla. 1997) (“Despite the federal adoption of a more lenient standard in [*Daubert*], we have maintained the higher standard of reliability as dictated by *Frye*.”); *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997) (“Our specific adoption of that test after the enactment of the evidence code manifests our intent to use the *Frye* test as the proper standard for admitting novel scientific evidence in Florida, even though the *Frye* test is not set forth in the evidence code.”); *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993) (“We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the *Frye* test. However, Florida continues to adhere to the *Frye* test for admissibility of scientific opinions.”)).

41. 823 So. 2d 104 (Fla. 2002).

42. *Id.* at 109.

scientific principles and methodologies upon which an expert relies in rendering his or her opinion” and not on the general acceptance of that expert’s conclusion.⁴³

A. *The Admissibility of Medical Causation Expert Testimony*

A district split between the Second and Fifth District Courts of Appeal, involving the applicability of *Frye* as to the admissibility of expert medical causation opinion testimony set the stage for the controversial Supreme Court of Florida’s decision in *Marsh*.⁴⁴ The Second District was the first of the districts to address this issue in *State Farm Mutual Automobile Insurance Co. v. Johnson*.⁴⁵ In this case, the issue was whether the expert’s testimony stating that trauma, experienced from plaintiff’s car accident, caused plaintiff’s fibromyalgia was admissible under *Frye* when the scientific community had not reached a generally accepted understanding of what causes fibromyalgia.⁴⁶ The parties agreed that there is an established association between trauma and fibromyalgia but that the *cause* of fibromyalgia is still “unknown to medical science.”⁴⁷ The court found that experts based their opinions upon their clinical experience, the plaintiff’s medical history, and the recognized “association between trauma and the onset of fibromyalgia.”⁴⁸ The court based its ruling of admissibility of the expert’s testimony on the accepted theory of “differential diagnosis”, rather than ruling on the lack of causation evidence between trauma and fibromyalgia.⁴⁹ The Second District held that because the experts for the plaintiff based their opinions of causation on the theory of differential diagnosis, which is not a “new or novel scientific test or procedure,” that it was therefore properly admitted.⁵⁰

43. *Id.* at 110; see *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995) (“In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand.” (emphasis added)).

44. See Bittick, *supra* note 9 at 11–12.

45. 880 So. 2d 721 (Fla. 2d Dist. Ct. App. 2004).

46. *Id.* at 722.

47. *Id.*

48. *Id.* at 723.

49. See *id.* (citing *U.S. Sugar Corp. v. Henson*, 787 So. 2d 3, 19 (Fla. 1st Dist. Ct. App. 2000), *aff’d*, 823 So. 2d 104 (Fla. 2002)).

Differential diagnosis is the standard scientific technique of identifying the cause of a medical problem by eliminating likely causes until the most probable one is isolated. This technique has been found to have widespread acceptance in the medical community, to have been subjected to peer review, and to not frequently lead to incorrect results.

Henson, 787 So. 2d at 19.

50. *Johnson*, 880 So. 2d at 723.

Just over a year after the Second District's decision, the Fifth District ruled on a very similar issue in *Marsh v. Valyou*,⁵¹ but did not adhere to the reasoning of the Second District court and certified a district conflict.⁵² The issue in *Marsh* was very similar to that in *Johnson* in that it involved the admissibility of expert testimony relating to whether trauma could cause fibromyalgia.⁵³ The court noted that the Supreme Court of Florida has distinguished between medical causation testimony that is derived from "studies and tests," which is subject to *Frye*, from that of "pure opinion testimony," which is based upon the "expert's personal experience and training," which is not subject to *Frye*.⁵⁴

The court explained that the overwhelming majority of the courts that have considered this issue under *Frye* or *Daubert* have held that the "causative evidence linking trauma to fibromyalgia is inadmissible because of the plaintiff's inability to demonstrate a general acceptance in the relevant scientific community of a causative link between the two."⁵⁵ The expert, in the court's opinion, did not show sufficient evidence that medical science has accepted the proposition that trauma causes fibromyalgia.⁵⁶ Without this showing, the expert's testimony cannot be admissible as "pure opinion" and is inapplicable under *Frye* because in order for the expert to come to a conclusion it requires the reliance on an underlying assumption, "that trauma *can cause* fibromyalgia," which has yet to be generally accepted in the scientific community.⁵⁷

1. The Supreme Court Settles the District Split

The Supreme Court of Florida accepted review of the Fifth District's decision in *Marsh* which certified conflict with the Second District.⁵⁸ The court, in a split decision, approved the Second District's decision in *Johnson*, and quashed the Fifth District's decision in *Marsh*.⁵⁹

The court found that the causation testimony as to the trauma and fibromyalgia was not new or novel because the testimony and opinions proffered were based on the expert's diagnosis, reviewing the patient's medical history, physical examinations, the expert's personal experience and pub-

51. 917 So. 2d 313 (Fla. 5th Dist. Ct. App. 2005), *rev'd*, 977 So. 2d 543 (Fla. 2007).

52. *See id.* at 323, 329.

53. *See id.* at 314.

54. *Id.* at 320.

55. *Id.* at 323.

56. *Marsh*, 917 So. 2d at 325–26.

57. *Id.* at 327 (emphasis added).

58. *Marsh v. Valyou*, 977 So. 2d 543, 544 (Fla. 2007).

59. *Id.* at 545.

lished findings, as well as, engaging in a differential diagnosis evaluation.⁶⁰ The court relied on numerous cases that stand for the position that medical causation testimony is not subject to *Frye* “when it is based solely on the expert’s training and experience.”⁶¹ The court further analyzed that the underlying methodology for the expert’s opinion testimony was based on differential diagnosis, which has been repeatedly held to be a “generally accepted method for determining specific causation.”⁶² Because differential diagnosis is not a “new or novel” method, the opinion that is reached by the expert based upon this methodology was found not to be subject to *Frye*.⁶³

a. *Did the Majority Get It Right for the Wrong Reasons?*

Justice Anstead concurred specially agreeing that the expert testimony at issue is admissible; however, he did not join the majority opinion because of his belief that the adoption of Florida’s Evidence Code, similar to the Federal Evidence Code, supersedes the *Frye* standard.⁶⁴ Justice Anstead, relying on the United States Supreme Court’s decision in *Daubert* and previous Florida case law,⁶⁵ expressed issue with the majority’s adherence to *Frye* when the court has failed to explain “how *Frye* has survived the adoption of the” Florida Evidence Code, which similar to the federal rule, does not mention *Frye* or the “general acceptance” standard.⁶⁶ He further reasoned that the legislative intent for adopting such a rule of evidence was to have courts “apply a straightforward relevancy test to expert evidence” and the *Frye* standard does not comply with such intention of the rule.⁶⁷ Some of the lower courts in Florida have confronted the issue that they believe exists with Florida’s continued adherence to the *Frye* standard and have reached the same conclusion as the United States Supreme Court in *Daubert* because the

60. *Id.* at 548.

61. *Id.* (quoting *Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th Dist. Ct. App. 2006); citing *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510 (Fla. 2d Dist. Ct. App. 2005); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th Dist. Ct. App. 1999)).

62. *Id.* at 549.

63. *See Marsh*, 977 So. 2d at 548–49.

64. *Id.* at 551 (Anstead, J., concurring); FLA. STAT. § 90.702 (2009).

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

FLA. STAT. § 90.702.

65. *See Bittick*, *supra* note 9, at 12.

66. *Marsh*, 977 So. 2d at 551 (Anstead, J., concurring).

67. *Id.*

Federal Rules of Evidence did not incorporate a general acceptance requirement.⁶⁸

Justice Anstead pointed out that the identical medical causation issue that was presented in *Marsh* has been resolved in other jurisdictions following *Daubert*, and such courts have found that, although the causative medical evidence may not be generally accepted in the relevant scientific community, such testimony meets the more liberal standard and is found to be reliable and relevant, therefore, making such testimony admissible in a court of law under that standard.⁶⁹ The concurrence suggests that perhaps the Supreme Court of Florida should find that the Florida Evidence Code has superseded *Frye* and adopt the *Daubert* standard, which will enable the trial judge to act as "gatekeeper" and analyze both the reliability and the relevance of the expert testimony proffered.⁷⁰ Such an approach would be in line with the accepted approach of the federal courts and many other jurisdictions, as well as adhere to the intent of the Florida Legislature.⁷¹

Justice Anstead concludes by stating that he would have held that *Frye* was superseded by the Florida Rules of Evidence and that the expert testimony on medical causation would be found to be admissible after determining its relevance and reliability as required under the Code.⁷²

b. *Does the Dissent Have It Right?*

Justice Cantero, in his dissenting opinion, did not agree with the majority's finding that the *Frye* standard would not apply to the medical causation testimony, and as such, he approved of the Fifth District Court of Appeal's reasoning in *Marsh*.⁷³ The *Frye* standard requires that the "basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community."⁷⁴ If there is not a requirement that the underlying basis for the expert's opinion be generally accepted, then any evidence offered would be admissible simply by stating that it is the "pure opinion" of the expert, rendering *Frye* essentially useless.⁷⁵

"Pure opinion" testimony is only that which is "based *solely* on [the expert's] experience and training" and it does not require reliance on some new

68. *Id.* at 554 (citing *Brown v. State*, 426 So. 2d 76, 86–88 (Fla. 1st Dist. Ct. App. 1983)).

69. *Id.* at 558 (citing *Reichert v. Phipps*, 84 P.3d 353, 364 (Wyo. 2004)).

70. *See id.* at 559 (Cantero, J., dissenting).

71. *See Marsh*, 977 So. 2d at 546.

72. *Id.* at 559 (Anstead, J., concurring).

73. *Id.* (Cantero, J., dissenting).

74. *Id.* at 560 (quoting *Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997)).

75. *See id.*

or novel “principle, test, or methodology.”⁷⁶ If the deduction upon which the expert’s opinion is based requires reliance on anything but his own personal experience, observations, or research, then his opinion is not “pure testimony” and the methodology upon which the opinion is formed is subject to *Frye*.⁷⁷

The expert opinion offered in *Marsh* is said by the plaintiff to be based upon the expert’s own experience and training, however, Justice Cantero points out that the expert must have some basis for forming the opinion that trauma is a plausible cause of fibromyalgia, and it is this scientific principle of causation that must be subject to the general acceptance standard.⁷⁸ Justice Cantero cites the reasoning of the Fifth District Court of Appeal in order to further articulate his position regarding the requirements of “pure opinion” by stating that:

[I]t is counterintuitive to permit an expert to ignore scientific literature accepted by the general scientific community in favor of the expert’s personal experience to reach a conclusion not generally recognized in the scientific community and then allow testimony about that conclusion on the basis that it is ‘pure opinion.’⁷⁹

To permit such evidence into a court of law would allow an expert to testify as to the specific causation of the plaintiff’s injury without ever requiring that opinion to be based upon the scientific community’s general acceptance of *general causation*, simply by saying that it is the expert’s “pure opinion.”⁸⁰ It would be impermissible to allow the expert to give his opinion that trauma caused Marsh’s fibromyalgia in this instance without first demonstrating that trauma *can* cause fibromyalgia by showing general acceptance of causation within the relevant scientific community.⁸¹

The majority opinion found that the expert’s testimony was also admissible because it was based upon “differential diagnosis,” which is a “generally accepted methodology for determining specific causation.”⁸² However, the

76. *Marsh*, 977 So. 2d at 560 (Cantero, J., dissenting).

77. See Bittick, *supra* note 9, at 13.

78. *Marsh*, 977 So. 2d at 561 (Cantero, J., dissenting). “This theory of general causation does not become admissible simply because it is the opinion of some experts that trauma caused Marsh’s fibromyalgia.” *Id.* at 562.

79. *Id.* at 562 (alteration in original) (quoting *Marsh v. Valyou*, 917 So. 2d 313, 327 (Fla. 5th Dist. Ct. App. 2005), *rev’d*, 977 So. 2d 543 (Fla. 2007)).

80. *Id.* at 563 (“Permitting an expert to testify that X caused Y in a specific case without requiring the general acceptance of the theory that X can *ever* cause Y expands the ‘pure opinion’ exception to the point where it swallows the rule.”).

81. See *id.* at 562–63.

82. *Marsh*, 977 So. 2d at 564 (Cantero, J., dissenting).

dissent takes issue with this line of reasoning finding that the use of differential diagnosis alone is not sufficient to get around the *Frye* standard for admissibility because "[d]ifferential diagnosis is not a wild card that can be used to introduce novel scientific theories into the courtroom."⁸³

Before an expert can begin a differential diagnosis determination, which is essentially the process of elimination, the expert must first determine what the scientific *general causes* of the plaintiff's condition are before they can be scientifically included or excluded as the *specific cause* of a certain condition.⁸⁴ This means that an expert cannot find that something was the cause of the plaintiff's condition in a particular instance without first demonstrating that it *could* be the cause of that condition.⁸⁵

The majority "obscures the fact that differential diagnosis *assumes* general causation . . . [and] give[s] the impression . . . that *any* differential diagnosis will *always* be admissible as 'pure opinion' that is not subject to *Frye*."⁸⁶ If this were the case, there would be no end as to what an expert could claim has been established though differential diagnosis if courts permit testimony on the specific cause of a condition without first demonstrating that the general causation of such condition is generally accepted by the relevant scientific community.⁸⁷

Since the expert witness in *Marsh* was unable to show general acceptance in the scientific community that trauma can be a cause of fibromyalgia, Justice Cantero believes that the expert opinion testimony that trauma is the

83. *Id.* at 564–65.

84. *See id.*; Bittick, *supra* note 9, at 14.

[D]ifferential diagnosis methodology *assumes* the answer to that general causation question, and proceeds to deduce from that underlying assumption—together with other evidence gleaned from a clinical examination, the patient's medical history, and any relevant tests—a conclusion regarding whether the exposure or event in fact caused the illness in a particular case. From this viewpoint, the general causation principle is the "thing from which the deduction is made," and therefore, in the words of *Frye*, it "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

Bittick, *supra* note 9, at 14.

85. *Marsh*, 977 So. 2d at 565 (Cantero, J., dissenting).

86. Bittick, *supra* note 9, at 14.

87. *See Marsh*, 977 So. 2d at 565 (Cantero, J., dissenting).

To illustrate [the absurd results that could result] with an extreme example: a patient suffering from depression sees a doctor because her arm hurts. She does not know why her arm hurts. The doctor diagnoses a broken arm. The patient cannot tell the doctor how she broke her arm. The doctor may, through performing tests and interviewing the patient, conclude that it could not have been a car accident (the patient was not involved in a car accident) and it could not have been playing sports (the patient does not play sports), but the doctor cannot then conclude that it must have been depression that caused the broken arm—unless, of course, the doctor can show that the theory that depression can cause a broken arm is generally accepted in the scientific community.

Id.

specific cause of fibromyalgia in this case is not admissible under the standard set forth under *Frye*.⁸⁸

IV. A COMPARATIVE ANALYSIS: IS FLORIDA'S APPROACH "GENERALLY ACCEPTED?"

In light of the strong split of opinion as to the admissibility of medical causation testimony in the Florida courts,⁸⁹ it is imperative to examine the views and methods that have been applied in other jurisdictions that have adopted one of the predominate common law tests, either *Frye* or *Daubert*, in order to provide guidance as to what has become "generally accepted" in relation to the admissibility of medical causation testimony.

A. *The Approach of the "Frye" Followers*

Many other jurisdictions have considered the issue as to the admissibility of medical causation testimony under *Frye* and have found that, unless the underlying basis for the opinion was generally accepted, such testimony would not be admissible.⁹⁰ The standard set forth in *Frye* explicitly states that "the thing *from which* the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁹¹ As *Frye* is commonly applied by courts, if the "thing from which the [expert's] deduction is made" is based solely upon the expert's training and experience, and only requires inductive reasoning to form the opinion, then the testimony is considered "pure opinion" and is not subject to *Frye*.⁹² However, if the expert is relying on deductive reasoning to form his conclusion, and it is based upon new or novel methods or theories, then the expert's opinion is subject to *Frye* and is only admissible if the methods or theories are generally accepted in the relevant scientific community.⁹³

If the theory or method upon which the expert is basing his or her opinion is in controversy or dispute within the scientific community, it shows

88. *See id.* at 565–66.

89. *See id.* at 568; *State Farm Mut. Auto. Ins. Co. v. Johnson*, 880 So. 2d 721, 723 (Fla. 2d Dist. Ct. App. 2004).

90. *See, e.g., Grant v. Boccia*, 137 P.3d 20, 24 (Wash. Ct. App. 2006).

91. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (emphasis added).

92. *Id.*; *see Luyster, supra* note 14, at 29–30.

93. *Luyster, supra* note 14, at 29–30; *see also Kuhn v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1178 (Kan. 2000) ("If a new scientific technique's validity has not been generally accepted or is only regarded as an experimental technique, then expert testimony based upon the technique should not be admitted." (citing *State v. Canaan*, 964 P.2d 681, 691–92 (Kan. 1998))).

that there is a lack of conformity among experts in the field and throws into question the validity of the opinion given by the expert being paid to give his opinion in court.⁹⁴ If the focus of the dispute in the community is over the underlying principles upon which the opinion is based, the testimony would not be admissible under *Frye*; however, if there was only dispute as to the conclusion that was drawn from the accepted underlying principles, the testimony would not be subject to *Frye*.⁹⁵

In one of the most cited relevant decisions, *Grant v. Boccia*,⁹⁶ the court was faced with the identical issue that the Supreme Court of Florida was presented with in *Marsh*, but took a much different approach and came to a completely opposite conclusion.⁹⁷ The decision in *Grant*, which was relied on by Justice Cantero in his dissenting opinion in *Marsh*,⁹⁸ cited and agreed with the reasoning of the Florida Fifth District Court of Appeal in *Marsh*, and is in full agreement with that court's determination that medical causation testimony, which is not supported by general approval of the scientific community, is subject to *Frye* and is not admissible.⁹⁹

In *Grant*, the plaintiff appealed the trial court's finding that the testimony of the plaintiff's expert witness—that trauma experienced as the result of a car accident caused the plaintiff's fibromyalgia—was inadmissible because the expert was unable to demonstrate that the *theory* that trauma causes fibromyalgia is generally accepted.¹⁰⁰ The appellate court found that there was not an abuse of discretion by the trial court because the evidence which was proffered was not supported by the general community, and it is the type of evidence which requires the expert to testify as to something that is not based

94. See *Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *5, *7 (Ariz. Super. Ct. June 1, 1998).

95. See *Frye*, 293 F. at 1014 (D.C. Cir. 1923); see also *Kuhn*, 14 P.3d at 1183 (“[M]edical expert opinion testimony that is controversial in its conclusions can support a jury finding of causation as long as the doctor’s conclusory opinion is based upon well-founded methodologies.” (alteration in original) (quoting *Osburn v. Anchor Labs., Inc.*, 825 F.2d 908, 915 (5th Cir. 1987))).

96. 137 P.3d 20 (Wash. Ct. App. 2006).

97. See *id.*

98. *Marsh*, 977 So. 2d at 570 (Cantero, J., dissenting).

99. *Grant*, 137 P.3d at 24–25.

100. *Id.* at 21.

[G]iven the clear disagreement in the relevant scientific community as to the cause of fibromyalgia, which conflict has also been recognized in other jurisdictions across the country, the trial court properly concluded [that] the [plaintiff’s] proffered expert testimony was subject to the *Frye* test and was inadmissible. Until medical science determines with sufficient reliability and acceptance that a causal relationship exists . . . such evidence is inadmissible under the *Frye* test . . .

Id. at 25.

solely upon his experience or training and is clearly at odds with the standard under *Frye*.¹⁰¹

Courts that continue to adhere to *Frye* and have not adopted *Daubert*, impose a heavy burden on the party attempting to admit the expert testimony into evidence and require the evidence to be more than reliable because under this standard “it is not enough that a qualified expert, or even several experts, testify that a particular scientific technique is valid;” instead the party must prove that the technique is “generally accepted by the relevant scientific community.”¹⁰²

Because *Frye* is considered the more stringent test, and less liberal than *Daubert*, courts that adhere to *Frye* do not find testimony which does not *strictly adhere* to the “general acceptance” standard to be admissible in a court of law.¹⁰³ To give such deference to the expert witness would defeat the very purpose of *Frye* by allowing unverified and unreliable evidence into the courtroom and would essentially turn the courtroom into a laboratory in which “junk” or “pseudo” science would be admissible.¹⁰⁴ Because science and evidence as to scientific tests or methods tend to be viewed by society—and potentially jurors—as the truth, or more credible than non-scientific evidence, such evidence could be given undue weight by a jury because of this preconceived notion regardless of its acceptance in the relevant scientific community.¹⁰⁵

“*Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles. . . . Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with impressive credentials.”¹⁰⁶

101. See *id.* at 24–25.

102. *Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *5 (Ariz. Super. Ct. June 1, 1998).

103. *Grant*, 137 P.3d at 24 (Under *Frye*, the existence of “acceptance in the relevant community as to the cause of fibromyalgia . . . is necessary for admissibility of expert opinion testimony that trauma following a car accident caused [the plaintiff’s] fibromyalgia.”).

104. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Grant*, 137 P.3d at 22 (reasoning that the “relevant inquiry is the general acceptance by scientists, not by the courts”).

105. See *Lofgren*, 1998 WL 299925, at *5; *Allison v. Mcghan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (finding that a jury is more likely than a judge to become “awestruck by the expert’s mystique”).

106. *Kuhn v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1178 (Kan. 2000) (alteration in original) (quoting *State v. Washington*, 622 P.2d 986, 992 (Kan. 1981)).

The predominate trend in jurisdictions that adhere to *Frye*—and *Daubert* alike—is a refusal to admit into evidence expert testimony in which the underlying basis for the opinion was not accepted and is unsupported by the relevant scientific community.¹⁰⁷

The Supreme Court of Florida, unlike most other jurisdictions that follow *Frye*, found that *Frye* did not apply to such unsupported medical causation testimony and admitted the expert's testimony into evidence.¹⁰⁸ Such determination appears to be inconsistent with the requirement of general acceptance in the relevant scientific community, which is explicitly stated as the requirement by the court in *Frye*.¹⁰⁹ The very distinction between the *Frye* standard and *Daubert* is that *Frye* is more stringent and requires general acceptance of the experts' evidence before it can become admissible in court.¹¹⁰ Although the majority opinion in *Marsh* explicitly states their continued adherence to *Frye*,¹¹¹ the substance of its decision, in allowing the unsupported and unverified expert testimony into court, completely contradicts the very purpose of *Frye*.¹¹²

B. *The Approach of the "Daubert" Followers*

The majority of jurisdictions, which have considered the issue of the admissibility of medical causation testimony, have resolved the question under the *Daubert* analysis.¹¹³ The predominant amount of the opinions applying the *Daubert* standard have found such medical causation testimony, which is based on a theory that has not yet been generally accepted, to be inadmissible.¹¹⁴ However, there are a few decisions in which the courts found the testimony to be admissible when applying this more liberal test and analyzing the reliability and relevancy of such testimony, rather than analyzing the general acceptance of the experts' evidence.¹¹⁵

Although general acceptance is not a required predicate under the *Daubert* standard, general acceptance by the relevant scientific community of a proposition upon which the expert's opinion is based is one factor a court

107. See, e.g., *Grant*, 137 P.3d at 25.

108. *Marsh v. Valyou*, 977 So. 2d 543, 551 (Fla. 2007).

109. See *Frye*, 293 F. at 1014.

110. See *id.*; *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 588 (1992).

111. *Marsh*, 977 So. 2d at 547.

112. See *Frye*, 293 F. at 1014.

113. See *Marsh*, 977 So. 2d at 570 (Cantero, J., dissenting); see, e.g., *Vargas v. Lee*, 317 F.3d 498, 502–03 (5th Cir. 2003) (applying *Daubert* and excluding testimony that a car accident caused fibromyalgia).

114. See *id.*

115. See *id.* at 571.

may take into consideration when determining the reliability of such expert testimony.¹¹⁶ Most courts, traveling under the *Daubert* standard, found that in order for testimony to be considered admissible, the opinion that is drawn by the expert must be based on a scientific predicate for which there has been established acceptance for such testimony to be considered reliable.¹¹⁷ In other words, there must be scientific support or acceptance in the relevant community for the opinions proffered by the experts to be considered reliable, and therefore, admissible in a court of law.¹¹⁸

In *Black v. Food Lion*,¹¹⁹ one of the most heavily relied upon federal decisions pertaining to the issues of the admissibility of medical causation testimony under *Daubert*, the court found that unsupported expert testimony is not reliable, and therefore, not admissible.¹²⁰ This case involved a slip and fall inside a Food Lion grocery store, from which that plaintiff claims caused the onset of her fibromyalgia.¹²¹ The expert witness produced by the plaintiff was also unable to show that the theory that trauma could cause fibromyalgia had been generally accepted within the relevant scientific community.¹²² The court further expressed that the expert's opinion that the trauma from plaintiff's fall caused the onset of fibromyalgia failed all of the non-exclusive factors to be considered under *Daubert* because the theory has not been verified by testing nor subject to peer review—it had failed to gain general acceptance within the relevant scientific community, and there was no potential rate of error from testing.¹²³ The court reasoned that:

If medical science does not know the cause [of the medical condition], then [the medical expert's] "theory" of causation, to the extent it is a theory, is isolated and unsubstantiated. Even [the expert has] recognized the limits of her opinion. . . . On its own terms, [the expert's] opinion includes conjecture, not deduction from scientifically-validated information. It also follows from the scien-

116. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

117. *See, e.g., Black v. Food Lion, Inc.*, 171 F.3d 308, 314 (5th Cir. 1999).

118. *See id.*

119. 171 F.3d 308 (5th Cir. 1999).

120. *Id.* at 314; *see Marsh v. Valyou*, 917 So. 2d 313, 324 (Fla. 5th Dist. Ct. App. 2005), *rev'd*, 977 So. 2d 543 (Fla. 2007).

121. *See Black*, 171 F.3d at 309.

122. *Id.* at 312.

123. *Id.* at 313; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) ("Many factors will bear on the [trial judge's] inquiry, and we do not presume to set out a definitive checklist or test.").

tific literature that [the expert's] theory has failed to gain acceptance within the medical profession.¹²⁴

Because the testimony of causation was clearly unsupported by specific methodology and lacked common acceptance in the relevant scientific community, the evidence could not be deemed reliable under *Daubert*, and therefore, to find such evidence admissible would be an abuse of the trial court's discretion.¹²⁵ It is important to note that a majority of the courts applying the *Daubert* standard have reached a similar conclusion as to inadmissibility, which is in line with the reasoning of the court in *Black*.¹²⁶

For courts adhering to the *Daubert* standard, it is important for the trial judge, acting as "gatekeeper," "to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value."¹²⁷ Even under the more liberal standard of *Daubert*, it is still critical for the court to disallow unsupported and unverified science in the courtroom.¹²⁸ In order for the trial court to properly "carry out its 'gatekeeping' responsibility, the court has discretion both in deciding *how* to evaluate an expert's reliability and in determining *whether* that expert's testimony is reliable."¹²⁹ However, "[t]he inquiry is 'a flexible one,' and '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.'"¹³⁰ An expert witness is different from a lay witness in that the expert's knowledge and opinion "cannot be based [upon a] subjective belief or [an] unsupported speculation."¹³¹ The trial court's "objective is 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"¹³²

124. *Black*, 171 F.3d at 313.

125. *Id.* at 314.

In this case, neither [the medical expert] nor medical science knows the exact process that results in fibromyalgia or the factors that trigger the process. Absent these critical scientific predicates, for which there is no proof in the record, no scientifically reliable conclusion on causation can be drawn. [The medical expert's] use of a general methodology cannot vindicate a conclusion for which there is no underlying medical support.

Id.

126. See *Marsh v. Valyou*, 977 So. 2d 543, 571 (Fla. 2007) (Cantero, J., dissenting).

127. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311–12 (11th Cir. 1999).

128. See *Daubert*, 509 U.S. at 579.

129. *Maras v. Avis Rent A Car Sys., Inc.*, 393 F. Supp. 2d 801, 806 (D. Minn. 2005) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

130. *Id.* (alteration in original) (quoting *Daubert*, 509 U.S. at 595).

131. *Jones v. Conrad*, No. CA2000-12-257, 2001 WL 1001083, at *4 (Ohio Ct. App. Sept. 4, 2001).

132. *Maras*, 393 F. Supp. 2d at 806 (quoting *Kumho Tire Co.*, 526 U.S. at 152).

A few of the courts applying *Daubert* have taken a different approach from the majority of like opinions, and have found such unsupported medical causation testimony to be admissible under the rationale that reliability “goes to the weight of [the evidence] rather than to its admissibility,” which is a determination for the fact finder not the trial judge.¹³³ However, the courts which do not find such evidence to be reliable hold that the evidence must meet the “threshold criteria” which is set forth in the Rules of Evidence, and then “[o]nce that threshold of reliability is met, then any remaining issues of credibility remain for the trier of fact.”¹³⁴ It is “the judge, not the jury, [whom] decides preliminary questions of fact under the rules of evidence [W]hen evidence is offered as science or on technical matters, the courts must assess its ‘validity’ [first] by referenc[ing] . . . multiple factors, before any substantive testimony is given.”¹³⁵

Courts that travel under the liberal *Daubert* standard have also held that an expert cannot rely on the accepted theory of “differential diagnosis” in order to testify as to the specific cause of plaintiff’s medical condition without first demonstrating the acceptance of general causation.¹³⁶ “In the absence of such a foundation for a differential diagnosis analysis, differential diagnosis generally may not serve as a reliable basis for an expert opinion on causation”¹³⁷ However, a valid differential diagnosis test only satisfies the *Daubert* standard if the expert can show the general causation of the medical condition by reliable methods.¹³⁸ Scientific evidence is only to be “deemed reliable if the principles and methodology used by an expert are *grounded* in the methods of science.”¹³⁹

133. *Jones*, 2001 WL 1001083, at *5; see also *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999) (“The gatekeeper role, however, is not intended to supplant the adversary system or the role of the jury: ‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” (alteration in original) (quoting *Daubert*, 509 U.S. at 596)).

134. *Jones*, 2001 WL 1001083, at *5.

135. Sandra F. Gavin, *No Second Chances: Best Practices for Expert Practice*, 38 STETSON L. REV. 41, 43–44 (2008).

136. See *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1252 (11th Cir. 2005). “[A]n expert does not establish the reliability of his techniques or the validity of his conclusions simply by claiming that he performed a differential diagnosis on a patient.” *Id.* at 1253; see also *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003) (“[I]t is . . . important to recognize that a fundamental assumption underlying [differential diagnosis] is that the final, suspected ‘cause’ . . . must actually be capable of causing the injury.” (alteration in original) (quoting *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1413 (D. Or. 1996))).

137. *McClain*, 401 F.3d at 1253.

138. See *id.*

139. *Clausen*, 339 F.3d at 1056 (emphasis added) (citing *Daubert*, 509 U.S. at 592–95).

Nevertheless, the Supreme Court of Florida in *Marsh* found that the medical causation evidence was not based on a new or novel methodology because the theory of the differential diagnosis is generally accepted in the scientific community and therefore it was admissible.¹⁴⁰ This rationale is evidently at odds with the approach taken by most courts, even those that are applying the more liberal and flexible standard under *Daubert*.¹⁴¹

V. LOOKING AHEAD

The Supreme Court of Florida was "unable to reach agreement on whether and how to apply the *Frye* test," and the majority left many unanswered questions in its opinion.¹⁴² These unanswered questions could pose much confusion for the lower courts in conducting *Frye* hearings in order to determine the admissibility of scientific evidence.¹⁴³ This confusion is evident in one of the most recent Florida decisions regarding the admissibility of medical causation testimony, *Andries v. Royal Caribbean Cruises, Ltd.*,¹⁴⁴ in which the Third District Court of Appeal reversed the trial court's finding that the unsupported evidence was inadmissible because it was based on novel and investigational methods.¹⁴⁵ The appellate court reasoned that:

The fact that experts may disagree about an opinion or medical diagnosis does not transform an expert's opinion into a "new or novel principle" in the second category of opinions, nor does that disagreement preclude or limit admissibility. Rather, the resulting "battle of the experts" creates an issue for resolution by the jury . . .

. . .¹⁴⁶

The court found the evidence of causation to be admissible under the approach set forth under *Marsh*, because they reasoned that the disagreement as

140. *Marsh v. Valyou*, 977 So. 2d 543, 549 (Fla. 2007).

141. *See id.* at 565 (Cantero, J., dissenting).

142. Bittick, *supra* note 9, at 13.

The approach the Florida Supreme Court took in *Marsh* . . . appears to narrow the reach of *Frye* with respect to expert evidence on medical causation, but leaves unanswered a number of questions about how *Frye* applies in that context. It is also unclear how the court's approach squares with prior case law applying *Frye*, and leaves for further clarification the critical distinctions between *Frye*-testable opinion and "pure opinion," and between underlying principles or methods and ultimate conclusions.

Id. at 14.

143. *See id.*

144. 12 So. 3d 260 (Fla. 3d Dist. Ct. App. 2009).

145. *Id.* at 265.

146. *Id.* at 261.

to the underlying basis of the opinion was merely a “duel of competing—and admissible—pure opinions.”¹⁴⁷

However, an important distinction becomes whether the experts disagree as to a *conclusion*, which formed from reliance on a generally accepted principal or methodology, or whether there is a disagreement as to the *reliability or acceptance* of principal or methodology itself.¹⁴⁸ If there is a disagreement in the relevant scientific community as to the reliability or acceptance of the principal or the methodology then that method is evidently not “generally accepted” and therefore cannot be admissible.¹⁴⁹ Alternatively, a disagreement as to an expert’s conclusion which is based upon accepted or reliable principles or methodologies is simply the expert’s opinion and will be admissible as long as it is based on an accepted or reliable principle or methodology.¹⁵⁰ The “battle of the experts” only creates an issue of fact for the jury to resolve when the disagreement concerns conclusions that are reached by different experts who are relying on *accepted* principles and methodologies.¹⁵¹ If there is a “battle of the experts” as to the reliability or the acceptability of a principle or methodology it is not a question of fact, but rather a question of admissibility for the judge to resolve.¹⁵²

The opinion in *Marsh* did not explain “where and how to draw the line between [the] underlying methodology and conclusions in cases involving issues of both general and specific causation.”¹⁵³ Nor did the court clarify “how the distinction between general causation and specific causation impacted its *Frye* analysis.”¹⁵⁴ Without such clarification, it could lead to much confusion among the Florida courts.¹⁵⁵

A. *Acknowledgement of Florida’s Evidence Code*

Florida’s Evidence Code is essentially identical to, and was based upon, the Federal Rules of Evidence.¹⁵⁶ However, the Supreme Court of Florida has yet to address how *Frye* is still applicable in light of the rules of evi-

147. *Id.* at 265.

148. *See Kuhn v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1183 (Kan. 2000).

149. *See id.*

150. *Id.* (“The logical corollary of the *Frye* test’s focus on the methodology rather than conclusions is that even unpopular conclusions are admissible so long as they are based upon generally accepted methodologies.”).

151. *Id.*

152. *See id.*

153. Bittick, *supra* note 9, at 13–14.

154. *Id.* at 14.

155. *See id.*

156. *Marsh v. Valyou*, 977 So. 2d 543, 554 (Fla. 2007) (Anstead, J., concurring).

dence.¹⁵⁷ Many of the Florida district and appellate courts have addressed the inconsistency in the rational of adhering to *Frye* since that is not the standard set forth under the Florida Evidence Code.¹⁵⁸

Part of Florida's Evidence Code requires that evidence be deemed inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."¹⁵⁹ The legislature passed such a statute to ensure that the only evidence that reaches the jury is both relevant and reliable in order to prevent prejudicing the jury with unverified and unreliable evidence.¹⁶⁰ To allow medical causation evidence into the courtroom without confirming that the underlying basis for the opinion is verifiable, is in complete contradiction with the intent of the legislature.¹⁶¹

Because the Florida Legislature did not include terminology consistent with the requirements under *Frye*, such as a "general acceptance" requirement, the continued adherence to *Frye* by the Florida courts is inconsistent with the intent of the code.¹⁶² It has been suggested that the Supreme Court of Florida should review the Florida Evidence Code and determine whether it has superseded *Frye*.¹⁶³

157. *Id.*

While [the Supreme Court of Florida] has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, it has done so without confronting the fact that those rules do *not* mention *Frye* or the test set out in *Frye*. Hence, unlike the United States Supreme Court, [the Supreme Court of Florida has] never explained how *Frye* has survived the adoption of the rules of evidence.

Id. at 551.

158. *See id.* at 554.

159. FLA. STAT. § 90.403 (2009).

160. *See Bittick, supra* note 9, at 9.

161. *See id.* at 15.

162. *Marsh*, 977 So. 2d at 554 (Anstead, J., concurring) ("*Frye* is *not* consistent with Florida's code.>").

163. *See id.* at 551, 554, 556. Justice Anstead certified the following question to be one of great public importance:

HAS THE *FRYE* STANDARD OF GENERAL ACCEPTANCE WITHIN THE PARTICULAR SCIENTIFIC COMMUNITY, AS A PRECONDITION TO THE ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE, SURVIVED THE ADOPTION OF THE FLORIDA EVIDENCE CODE? AND IF IT HAS NOT, DOES IT NEVERTHELESS REMAIN A FACTOR TO BE CONSIDERED WHEN BALANCING THE PROBATIVE WORTH OF THE PROFFERED EVIDENCE AGAINST COUNTERVAILING FACTORS, AS PROVIDED BY SECTION 90.403, FLORIDA STATUTES?

Id. at 556.

B. *Frye or Daubert? That Is the Question*

Although the Supreme Court of Florida has explicitly and adamantly held fast to the *Frye* standard, the decision in *Marsh* appeared to take a more liberal approach and the court did not require strict adherence to the general acceptance standard as did other courts in jurisdictions that follow *Frye*.¹⁶⁴ It is not clear how the court's decision aligns with the prior case law that has applied the *Frye* standard nor has the court provided clarification as to the distinction between pure opinion and opinion which is subject to *Frye*.¹⁶⁵ It appears as if the Supreme Court of Florida in *Marsh* really applied the liberal standard under *Daubert*, instead of *Frye*, when they determined that "[a] lack of studies conclusively demonstrating a causal link between trauma and fibromyalgia . . . calls for further research [and does] not preclude admission of the testimony."¹⁶⁶ The court in *Marsh* continually referred to and relied on the reliability of the evidence proffered and did not require the general acceptance of the causation theory in the scientific community, which is more in line with the reasoning under *Daubert*.¹⁶⁷

The question now becomes: Does Florida, in actuality, adhere to the *Frye* standard after the Supreme Court of Florida's decision in *Marsh*?¹⁶⁸

VI. CONCLUSION

The determination of admissibility of expert testimony is a critical issue for judges and trial lawyers alike; it is also one of much debate and confusion among the courts. Because of the critical importance and the lack of certainty that surrounds this topic in the Florida courts, it is imperative that the Supreme Court of Florida adequately address and clarify the standard for courts to apply in determining the admissibility of expert testimony. Being that the Supreme Court of Florida's decision in *Marsh* is clearly at odds with the Florida Evidence Code and the majority of other jurisdictions adhering to both *Frye* and *Daubert*,¹⁶⁹ a clarification in the current law might mean that the Court expressly reject *Frye* and adopt *Daubert* as the relevant standard in Florida taking into account the Florida Evidence code, or perhaps re-visit its reasoning in *Marsh* as to the *application* of the general acceptance standard to medical causation expert testimony in Florida courts.

164. See *id.* at 564, 565, 570 (Cantero, J., dissenting).

165. Bittick, *supra* note 9, at 14.

166. *Marsh*, 977 So. 2d at 550.

167. See *id.*

168. See Bittick, *supra* note 9, at 8.

169. See *Marsh*, 977 So. 2d at 570 (Cantero, J., dissenting).

TAKING ON TOBACCO: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

JEREMY R. SINGER*

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I. INTRODUCTION

On June 22, 2009, President Barack Obama signed a landmark federal bill that gives the Food and Drug Administration (FDA) broad authority to

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regulate tobacco products and how those products are advertised.¹ The Family Smoking Prevention and Tobacco Control Act² is considered the most significant legislation in the last fifty years placing restrictions on the tobacco industry. The bill received overwhelming support from both parties.³ It passed in the House of Representatives by a vote of 307-97 and in the Senate by a vote of 79-17.⁴ By passing the bill, the Legislature and the President “ensured that the landscape for cigarette manufacturers will look dramatically different in just a few years: no more candy-flavored cigarettes, no more cool T-shirts or other marketing gimmicks, and no more sporting-event sponsorships.”⁵ Although the bill was received with strong support in Congress, there are still concerns regarding the broad powers granted to the FDA under the Act as well as First Amendment⁶ implications.

In general, this article will provide an overview of the Family Smoking Prevention and Tobacco Control Act. Section II provides the historical background of tobacco advertising and legislation in this country, and how the FDA did not have the power to regulate tobacco until the passage of this new tobacco law. Section III will closely examine the regulations implemented by the Act and discuss whether the FDA has a questionable role in regulating the tobacco industry. Some believe the FDA is not equipped to handle the role of regulating tobacco, while others believe the Agency is more than capable of doing so.

Section IV of this article will look at First Amendment issues that may surface in the future with FDA regulations passed under the new law. The first part of section IV will explain the four-step analysis the United States Supreme Court formulated in order to determine whether commercial speech is being violated under the First Amendment. The middle part of section IV will discuss both total and partial bans on tobacco advertising and how they relate to the new law. The latter part of Section IV will compare bans that have been made on alcohol advertising in the past by providing synopses of two important cases. Section IV will conclude with an examination of the pending litigation by the major tobacco companies against the federal gov-

1. Melissa Healy, *FDA Unfiltered; A Look at the New Tobacco Law; The Legislation Extends Oversight but Bows to Economic and Administrative Reality*, L.A. TIMES, June 29, 2009, at E3.

2. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

3. Stephen Dinan, *Tobacco Law Called a Loss for ‘Special Interest’; Activist Approach Cited as Obama Signs Landmark Bill*, WASH. TIMES, June 23, 2009, at A6.

4. *Id.*

5. *Id.*

6. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

ernment. Section V will begin by looking at the effects the law will have on the tobacco industry and analyze whether smoking habits will be changed as a result of the law. The latter part of section V will discuss the President's current smoking habit and how he can be an important spokesperson for the new legislation. The last section of this article will explain what kind of impact the Family Smoking Prevention and Tobacco Act will have, analyze potential First Amendment implications that may arise in the future, and suggest that other industries may be affected by similar legislation.

II. HISTORICAL BACKGROUND

The first tobacco advertisement is believed to date back to 1789, when Lorillard Tobacco Co. placed an advertisement in a newspaper.⁷ In 1909, cigarette packs began to include small trading cards.⁸ Soldiers during World Wars I and II received free cigarettes, and in the 1940s and 1950s, popular television shows were backed by cigarette manufacturers.⁹ In the 1960s, tobacco advertising began to dwindle as health risks associated with smoking became clear.¹⁰ "[I]n 1964, the U.S. surgeon general issued a report linking smoking with cancer, yet as late as 1994, tobacco executives testified before Congress that smoking neither caused cancer nor was addictive."¹¹ Anti-smoking legislation has been a constant fight in the legislature lasting nearly half of a century.¹² Prior to the enactment of the Family Smoking Prevention and Tobacco Control Act, the FDA did not have the "authority to regulate what goes into tobacco products."¹³ The FDA had first asserted its right to regulate tobacco products in 1996 under the Federal Food, Drug, and Cos-

7. Scott Olstad & Randy James, *A Brief History of: Cigarette Advertising*, TIME, June 29, 2009, at 14.

8. *Id.* ("The American Tobacco Co. includes small baseball cards with cigarette packs. Pittsburgh Pirate Honus Wagner's card [was estimated to fetch] \$2.8 million at a 2007 auction.").

9. *Id.*

10. *Id.*

11. Charles Kochakian, *Tobacco Law Makes Smoking Less Alluring: Cigarettes Will Continue to be a Major Danger to Public Health*, NEW HAVEN REG., July 10, 2009, at 4. "A [1991] study shows that nearly as many 6-year-olds recognize Joe Camel as know Mickey Mouse. The cartoon pitchman [was] retired in 1997." Olstad & James, *supra* note 7.

12. Jim Abrams, *Tobacco Bill: Lifesaver—or Federal Intrusion?*, ORLANDO SENTINEL, June 13, 2009, at A6 ("President Barack Obama, struggling with his own nicotine habit, saluted the bill, which he [signed]. He said, 'For over a decade, leaders of both parties have fought to prevent tobacco companies from marketing their products to children and provide the public with the information they need to understand what a dangerous habit this is.'").

13. *Id.*

metic Act (FDCA),¹⁴ but has not been able to do so until the passage of the new bill.¹⁵

Preceding the FDA's announcement that it would regulate the tobacco industry, Congress averaged passing only one tobacco bill every five years.¹⁶ Following the FDA's claim that they could regulate tobacco, Congress averaged passing one tobacco bill every year for five years.¹⁷ "By the time the Supreme Court vacated the agency's rulemaking, Congress had enacted limited versions of most of [the] FDA's major initiatives, including programs to reduce teen smoking, prohibitions on vending machine sales, and higher excise taxes on all tobacco products and cigarette papers."¹⁸ In the 105th Congress, Senator John McCain introduced the first of six comprehensive bills "which had been proposed to end lawsuits brought by forty-one state attorneys general against the tobacco industry."¹⁹ The FDA asserting its right to regulate tobacco was found unconstitutional in the United States Supreme Court case of *FDA v. Brown & Williamson Tobacco Corp.*²⁰

Since 1971, broadcast advertising has been banned for cigarettes and little cigars.²¹ Another federal statute known as the Comprehensive Smoking Education Act placed limitations on tobacco labeling and advertising.²² Its purpose was for Congress "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health."²³ Congress wanted to ensure that "the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes."²⁴

14. 21 U.S.C. § 301 (2006).

15. Healy, *supra* note 1.

16. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 627 (2008).

17. *Id.*

18. *Id.*

19. *Id.* at 628 (citing C. STEPHEN REDHEAD & JOY AUSTIN-LANE, TOBACCO LEGISLATION IN THE 105TH CONGRESS: SIDE-BY-SIDE COMPARISON OF S. 1415, S. 1530, S. 1638, S. 1889, H.R. 3474, AND H.R. 3868, CRS REPORT FOR CONGRESS (Aug. 19, 1988)).

20. 529 U.S. 120 (2000).

21. 15 U.S.C. § 1335 (2006).

22. 15 U.S.C. § 1331.

23. *Id.*

24. 15 U.S.C. § 1331(1).

III. A CLOSER LOOK AT THE NEW TOBACCO LAW

A. *Regulation Specifics*

The main purpose behind the new legislation is to provide the FDA with broad authority to regulate all tobacco products and how they are marketed.²⁵ There are several critical pieces to the legislation that will create great change for the tobacco industry. Warning labels on cigarette packages will now have to cover fifty percent of the front and rear of the packages.²⁶ “The word ‘warning’ must be included in capital letters.”²⁷ Sports and entertainment events will be prevented from having tobacco-related sponsorships.²⁸ Giveaways of nontobacco items will no longer be allowed with the purchase of tobacco products.²⁹ “A federal ban will be imposed on all outdoor tobacco advertising within 1,000 feet of schools and playgrounds.”³⁰

Adult-only facilities will be the only places allowed to contain point-of-sale advertising, and tobacco vending machines will disappear in all locations except those restricted for adults.³¹ If a retailer sells tobacco products

25. See Healy, *supra* note 1. The ten purposes granted by Congress to the FDA are as follows:

(1) to provide authority to the Food and Drug Administration to regulate tobacco products . . . by recognizing it as the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products as provided for in this division; (2) to ensure that the Food and Drug Administration has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco; (3) to authorize the Food and Drug Administration to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products; (4) to provide new and flexible enforcement authority to ensure that there is effective oversight of the tobacco industry’s efforts to develop, introduce, and promote less harmful tobacco products; (5) to vest the Food and Drug Administration with the authority to regulate the levels of tar, nicotine, and other harmful components of tobacco products; (6) in order to ensure that consumers are better informed, to require tobacco product manufacturers to disclose research which has not previously been made available, as well as research generated in the future, relating to the health and dependency effects or safety of tobacco products; (7) to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers; (8) to impose appropriate regulatory controls on the tobacco industry; (9) to promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases; and (10) to strengthen legislation against illicit trade in tobacco products.

Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(1)–(10), 123 Stat. 1776, 1781–82 (2009) (codified as amended in scattered sections of 21 U.S.C.).

26. Abrams, *supra* note 12.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Abrams, *supra* note 12.

to minors, he or she will face possible federal enforcement and penalties.³² Cigarettes sweetened by candy flavors, “herb[s] or spices such as strawberry, grape, orange, clove, cinnamon or vanilla” will be barred from purchase.³³ These flavored tobacco products have been known to appeal to younger people.³⁴ “Light,” “mild” or “low” cigarettes that give consumers the impression that they are less harmful, will no longer be sold “unless the manufacturer can prove that [they] . . . will significantly reduce the risk of tobacco-related diseases” when the cigarettes are smoked.³⁵ However, the FDA will not have the ability to ban any class of tobacco products outright.³⁶

B. *A Questionable Role for the FDA*

Several industry experts criticized the bill and the role of the FDA in regulating tobacco.³⁷ Stanton Glantz, a professor of medicine and director of the Center for Tobacco Control Research and Education at the University of California, San Francisco stated:

“Most people in the field are not enthused about the bill. They have real problems with the bill. I think the bill is a huge missed opportunity for public health. The FDA’s scientific advisory committee will have three tobacco industry representatives on it. They are non-voting, but I don’t think that will matter. The fact that they are there at all is a problem. I think people have grossly underestimated how much trouble that will cause.”³⁸

Scott Raminger, President of the American Wholesale Marketers Association remarked, “We don’t really think it’s appropriate for [the] FDA to be regulating tobacco. We don’t think having more regulations is going to ac-

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*; Healy, *supra* note 1.

36. Healy, *supra* note 1.

37. *See* Shari Roan & Shara Yurkiewicz, *FDA Unfiltered; Experts Weigh in on the Ramifications; Industry Insiders and Academics Offer Personal, Professional Insights on the Law*, L.A. TIMES, June 29, 2009, at E3.

38. *Id.* The author summarized an industry professional’s opinion:

Because the legislation allows the Food and Drug Administration to appoint a scientific advisory committee that will include representatives from the tobacco industry, Glantz says he feels the FDA will be unable to accomplish far-reaching measures to control tobacco and reduce smoking rates. Moreover, he says, the bill minimizes the adverse economic effect on the tobacco industry, when the goal, in his opinion, should be to drive such companies out of business.

Id.

comply with anything except cost the taxpayers a lot more money.”³⁹ Some members of Congress believe that by letting the FDA give “its blessing to the sale of [certain] tobacco products” and not to others, the FDA may lead people to think that the approved products are safe.⁴⁰

1. Too Much for the FDA to Handle?

Politicians who voted against the bill argued that the FDA does not have adequate resources to handle the task.⁴¹ Senate minority leader Mitch McConnell expressed his opinion on the FDA’s role by commenting, “Mandating the FDA to regulate and approve the use of tobacco would be a distortion of the agency’s mission and a tremendous misuse of its overstretched priorities. We should focus FDA resources on protecting the public health, not burdening it with an impossible assignment.”⁴² However, some of the seventeen senators who voted against the FDA regulating tobacco receive significant campaign contributions from tobacco companies.⁴³ Senator Saxby Chambliss opposed the bill because he feels that the tobacco industry would be overregulated.⁴⁴

Even without tobacco regulation, the FDA is already strained in carrying out its other responsibilities such as ensuring “the safety of the nation’s food, drugs and medical devices.”⁴⁵ Tobacco is not an item that the FDA is used to regulating such as a medical device or food.⁴⁶ The FDA does not have any demonstrable health benefits to weigh against the risks that are associated with tobacco use.⁴⁷ Major cigarette manufacturer, R.J. Reynolds, argued that instead of placing regulatory control on an already overburdened FDA, “more emphasis should be placed on educating smokers” about the dangers associated with smoking.⁴⁸ Representative Henry A. Waxman acknowledged that tobacco regulation is an unusual role for the Agency, but he believes the FDA is the only agency properly equipped to decrease the damage caused by tobacco use.⁴⁹ In an interview, Representative Waxman

39. *Id.*

40. Healy, *supra* note 1.

41. Halimah Abdullah, *Senators Who Opposed Tobacco Bill Received Top Dollar from Industry*, MCCLATCHY-TRIB. BUS. NEWS (Wash., D.C.), June 12, 2009.

42. *Id.*

43. *Id.*

44. *Id.*

45. Healy, *supra* note 1.

46. *Id.*

47. *Id.*

48. Dinan, *supra* note 3.

49. Healy, *supra* note 1.

stated, “The FDA is the exact agency that should have that authority—it’s a scientific organization with regulatory powers.”⁵⁰

2. *FDA v. Brown & Williamson Tobacco Corp.*

*FDA v. Brown & Williamson Tobacco Corp.*⁵¹ was a critical United States Supreme Court case that determined whether the FDA could actually regulate tobacco. In 1996, “[t]he FDA determined that nicotine is a ‘drug’ and that cigarettes and smokeless tobacco are ‘drug delivery devices,’ and therefore [the FDA] had jurisdiction under the FDCA to regulate tobacco products as customarily marketed.”⁵² The United States Supreme Court held that “Congress has not given the FDA the authority” to regulate tobacco.⁵³ The majority looked at the FDCA as a whole and determined that Congress did not intend to include tobacco products within the FDA’s jurisdiction.⁵⁴

However, the dissent felt that Congress intended for the FDA to have the authority to regulate substances intended to affect any function or structure of the body under the FDCA.⁵⁵ Justice Breyer proceeded with the following opinion in order to reinforce his statutory interpretation of the FDCA:

In its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally. Cigarettes achieve their mood-stabilizing effects through the interaction of the chemical nicotine and the cells of the central nervous system. Both cigarette manufacturers and smokers alike know of, and desire, that chemically induced result. Hence, cigarettes are “intended to affect” the body’s “structure” and “function,” in the literal sense of these words.⁵⁶

If tobacco industry executives challenged the new Act under the holding of *Brown & Williamson*, the statute would probably be upheld. The new

50. *Id.*

51. 529 U.S. 120 (2000).

52. *Id.* at 127.

53. *Id.* at 161 (“[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”).

54. *Id.*

55. *Brown & Williamson*, 529 U.S. at 161 (Breyer, J., dissenting) (noting that tobacco products fall under the statutory language of the FDCA).

56. *Id.* at 162 (Breyer, J., dissenting).

law, unlike the one in *Brown & Williamson*, has statutory language that provides the FDA with the power to regulate tobacco.⁵⁷

IV. FIRST AMENDMENT CONSIDERATIONS

A. *Four-Step Analysis for Commercial Speech*

The United States Supreme Court formulated a four-step test to determine whether First Amendment rights were being violated for commercial speech.⁵⁸ “The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”⁵⁹ The four-step analysis the United States Supreme Court provided is as follows:

In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁶⁰

The new tobacco law prohibits and regulates certain forms of commercial speech for the tobacco companies.⁶¹ For example, “[a] federal ban will be imposed on all outdoor tobacco advertising within 1,000 feet of schools and playgrounds.”⁶² Utilizing the four-part analysis from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁶³ the first step is to determine if tobacco use is a lawful activity.⁶⁴ Tobacco products

57. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(b), 123 Stat. 1776, 1784 (2009) (codified as amended in scattered sections of 21 U.S.C.).

58. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

59. *Id.* at 562–63 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–457 (1978)).

60. *Id.* at 566.

61. See Family Smoking and Prevention Tobacco Control Act § 203, 123 Stat. 1846.

62. *Abrams*, *supra* note 12.

63. 447 U.S. 557 (1980).

64. *Id.* at 566.

are lawful because they are currently not banned by any law.⁶⁵ As long as the message the tobacco manufacturers provide is not misleading, then the first part of the four-part analysis is met.⁶⁶ The next step is to determine “whether the asserted governmental interest is substantial”⁶⁷ to restrict advertising “within 1,000 feet of schools and playgrounds.”⁶⁸ It can be argued that the government interest is substantial because every day, 3500 young people smoke for the first time.⁶⁹ Young people may be induced to smoke for the first time due to advertising that is displayed near their schools.

If the first two inquiries yield a positive answer, then a court must determine whether the regulation of the tobacco advertising “directly advances the governmental interest asserted,” and whether the regulation “is not more extensive than is necessary to serve that interest.”⁷⁰ Congress provided an initial list of reasons in Section 2 of the bill to explain the substantial governmental interest.⁷¹ In addition, Congress provided statistical information in Section 2 of the bill to further expand on the substantial government interest.⁷² If a court determines that the findings listed in Section 2 of the Family

65. Healy, *supra* note 1 (“The law prohibits the FDA from banning outright all tobacco products or any class of tobacco products—such as cigarettes, cigars or chew.”).

66. *Cent. Hudson*, 477 U.S. at 566.

67. *Id.*

68. *Abrams*, *supra* note 12.

69. *Kochakian*, *supra* note 11.

70. *Cent. Hudson*, 447 U.S. at 566.

71. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, §§ 2(5)–(7), (10), 123 Stat. 1776, 1777 (2009) (codified as amended in scattered sections of 21 U.S.C.). Some of Congress’ reasons for restricting tobacco advertising are as follows:

(5) Tobacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents. (6) Because past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, comprehensive restrictions on the sale, promotion, and distribution of such products are needed. (7) Federal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products. . . . (10) The sale, distribution, marketing, advertising, and use of tobacco products are activities in and substantially affecting interstate commerce because they are sold, marketed, advertised, and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the Nation’s economy.

Id.

72. Family Smoking Prevention and Tobacco Control Act §§ 2(14)–(16), (23), (24), 123 Stat. at 1777–81. Some of Congress’ reasons for restricting tobacco advertising are as follows:

(14) Reducing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today’s children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately \$75,000,000,000 in savings attributable to reduced health care costs. (15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth. Past efforts to oversee these activities have not been successful

Smoking Prevention and Tobacco Control Act are adequate to further a substantial government interest, then it will be difficult for a tobacco manufacturer claiming a First Amendment infringement to prevail. Under the existing commercial speech doctrine, however, it is unclear how the United States Supreme Court would rule on these limitations on tobacco advertising. The tobacco companies are already arguing that the regulation is more extensive than necessary because the existing ban on television and radio advertising combined with this current ban on outdoor advertising within 1000 feet of schools and playgrounds will make it “almost impossible to communicate . . . ‘reduced harm’ [tobacco] products.”⁷³ An argument could be made that a less extensive regulation would be to only ban any outdoor advertising within a 1000 feet that *faces* and *can be viewed* by schools and playgrounds. For example, if the advertisement is within 1000 feet of a school or playground, but it faces a highway, that outdoor advertisement should not be banned.

B. *Total Ban on Tobacco Advertising*

There are currently no limits that the FDA can place on tobacco advertising under the Family Smoking Prevention and Tobacco Control Act.⁷⁴ “The law gives the FDA broad authority to restrict marketing and promotion ‘to the fullest extent permissible’ under the 1st Amendment”⁷⁵ The lack of limits on what the FDA can do “is certain to be tested in future court cases.”⁷⁶ The United States Supreme Court has never been faced with a case regarding a total ban on tobacco advertising.⁷⁷ However, there are arguments for a total ban on tobacco advertising.⁷⁸

in adequately preventing such increased use. (16) In 2005, the cigarette manufacturers spent more than \$13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use. . . . (23) Children are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands. (24) Tobacco company documents indicate that young people are an important and often crucial segment of the tobacco market. Children, who tend to be more price sensitive than adults, are influenced by advertising and promotion practices that result in drastically reduced cigarette prices.

Id.

73. Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES, Sept. 1, 2009, at B1.

74. Healy, *supra* note 1.

75. *Id.*

76. *Id.*

77. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 609 (1996).

78. See *id.* at 598. Some of the arguments for a total ban include:

Smoking is an addictive habit that causes severe social harm by giving rise to serious, often fatal illnesses in thousands of individuals every year. Government may exercise its regulatory

Another justification for a total ban on tobacco advertising is that citizens cannot be trusted to make their own rational judgments on the exposure to truthful advertising based on a lawful activity.⁷⁹ However, it may be argued that tobacco advertising is not truthful advertising at all. If a person cannot be trusted to make life-affecting choices based on the open marketplace of advertising, then the government is justified in censoring the tobacco advertising that could lead to harm to that person.⁸⁰ This argument is at odds with “the fundamental premises of both the First Amendment and the notions of democratic theory which underlie our system.”⁸¹

C. *Partial Ban on Tobacco Advertising*

A less controversial invasion of free speech is to place partial restrictions on forms of tobacco advertising. The Family Smoking Prevention and Tobacco Control Act spells out certain forms of tobacco advertising that are not considered a complete advertising ban.⁸² However, the broad authority given to the FDA to restrict marketing and promotion raises concerns of future total advertising bans.⁸³ Although minors do not have the same level of First Amendment rights as adults, tobacco advertising aimed at adults may be restricted because minors may be exposed to that same advertising.⁸⁴ General restrictions on advertising near schools and playgrounds is constitutional, but a complete ban on advertising simply because minors may be exposed to it is unconstitutional.⁸⁵ “To allow such restrictions would be to reduce all of society to a community of children for purposes of the First Amendment.”⁸⁶

Another alternative to a total ban is “tombstone” limitations.⁸⁷ These limitations only allow the manufacturer to include the “name, price, and tar

police powers to prevent or reduce this harm. Government possesses the power to protect the public interest by completely banning sale of tobacco products, . . . but government need not take such extreme action. Rather . . . [the] government may take the lesser step of allowing sales to continue while prohibiting all promotional advertising of tobacco products. Because . . . a reduction in advertising would reduce demand for the product, such a prohibition would largely achieve the government’s legitimate goal of curbing tobacco use indirectly by reducing the public’s demand for that product

79. *See id.* at 604.

80. *Id.* at 604–05.

81. Redish, *supra* note 77, at 605.

82. *See generally* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

83. Healy, *supra* note 1.

84. Redish, *supra* note 77, at 607–08.

85. *See id.*

86. *Id.*

87. *Id.* at 625.

and nicotine levels” contained in the product.⁸⁸ The Act’s requirement that warning labels on cigarette packages will now have to cover fifty percent of the front and rear of the packages may be considered a “tombstone” limitation.⁸⁹ There are two First Amendment issues associated with “tombstone” limitations: “(1) they interfere with a speaker’s choice of method of expression, and (2) they stifle the expression of particular viewpoints.”⁹⁰ First Amendment issues that will be associated with the new tobacco law are important to note:

The First Amendment interests threatened by the regulation of tobacco advertising are considerably more substantial than many have recognized. If the government is permitted to prohibit truthful advocacy of a lawful activity because of fear that citizens will make unwise choices, there is no basis on which to distinguish government’s efforts to do the same in other areas of public decisionmaking. . . . [P]rohibition of tobacco advertising constitutes a governmental exercise in mind control of its citizens—hardly a course of action consistent with the letter, spirit or tradition of the First Amendment right of free expression.⁹¹

D. *Bans on Alcohol Advertising*

The alcohol industry has also faced similar types of bans as the tobacco industry regarding certain forms of advertisement. First Amendment issues have been raised by those opposing advertising restrictions on alcohol products. The United States Supreme Court case of *44 Liquormart, Inc. v. Rhode Island*⁹² set a precedent in determining whether certain forms of prohibition on alcohol advertising were constitutional.⁹³ In *Anheuser-Busch, Inc. v. Schmoke*,⁹⁴ a city ordinance was challenged on First Amendment constitutional grounds.⁹⁵

88. *Id.*

89. Abrams, *supra* note 12.

90. Redish, *supra* note 77, at 626.

91. *Id.* at 639.

92. 517 U.S. 484 (1996).

93. *See id.* at 485.

94. 101 F.3d 325 (4th Cir. 1996).

95. *See id.* at 327.

1. *44 Liquormart, Inc. v. Rhode Island*

In *44 Liquormart*, Rhode Island banned the advertisement of liquor prices except at locations that were actually selling liquor.⁹⁶ A Rhode Island liquor retailer brought action against the State of Rhode Island, claiming that the advertisement ban violated the First Amendment of the United States Constitution.⁹⁷ The United States Supreme Court found that an outright ban on all liquor advertising throughout the State of Rhode Island was unconstitutional.⁹⁸ The history behind Rhode Island's ban on alcohol advertisement was provided in the case:

In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from "advertising in any manner whatsoever" the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street. The second statute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements—even those referring to sales in other States—that "make reference to the price of any alcoholic beverages."⁹⁹

The Supreme Court of Rhode Island reviewed the constitutionality of the statutes, and the court found in both cases that the statutes were not unconstitutional.¹⁰⁰ The United States Supreme Court, however, followed the four-step analysis for commercial speech from *Central Hudson* to make a determination on this particular issue.¹⁰¹ Justice Stevens, writing for the majority, opined that the Rhode Island ban was "a blanket prohibition against truthful, nonmisleading speech about a lawful product."¹⁰² When applying the four-part test, the United States Supreme Court did not find that the blanket ban on the alcohol advertising was effective in advancing the State's interest.¹⁰³

96. *44 Liquormart*, 517 U.S. at 489.

97. *Id.* at 493.

98. *Id.* at 516.

99. *Id.* at 489–90.

100. *See id.* at 490–92.

101. *See 44 Liquormart*, 517 U.S. at 500 n.9.

102. *Id.* at 504.

103. *Id.* at 505–07.

Although the Family Smoking Prevention and Tobacco Control Act does not impose a ban on all tobacco advertising, it “gives the FDA broad authority to restrict marketing and promotion” in the future as long as First Amendment rights are not being violated.¹⁰⁴ This broad authority under the Act enables the FDA to create a total ban on tobacco advertising. If the FDA were to implement such a total ban, First Amendment violations would probably be found in future court cases. The FDA would have to provide a tremendous amount of statistical data and information to explain how a total ban on tobacco advertising would be effective in advancing the government’s interest, and that the total ban is not more extensive than necessary to serve the government’s interest.¹⁰⁵

2. *Anheuser-Busch, Inc. v. Schmoke*

In *Anheuser-Busch*, there was a city ordinance that prohibited the placement of outdoor advertisement featuring alcoholic advertisements “in certain areas of Baltimore City.”¹⁰⁶ Unlike the statute in *44 Liquormart*, which prohibited advertising throughout the entire state of Rhode Island, the ordinance in this case was targeted at specific areas of the city where children were either at school or in their neighborhoods.¹⁰⁷ The main difference between Baltimore City’s ordinance and Rhode Island’s regulation is that Baltimore City’s ordinance was targeted only at children who were not of a legal drinking age.¹⁰⁸ The United States Supreme Court has repeatedly emphasized that “children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media.”¹⁰⁹

The United States Court of Appeals for the Fourth Circuit utilized the same four-part test from *Central Hudson* that the United States Supreme Court utilized in *44 Liquormart*.¹¹⁰ When applying the United States Supreme Court’s four-part analysis, the United States Court of Appeals for the Fourth Circuit held that Baltimore’s city ordinance was not a violation of the

104. Healy, *supra* note 1.

105. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

106. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327–28 (4th Cir. 1996).

107. *Id.*

108. *Id.* at 329 (“Baltimore’s interest is to protect children who are not yet independently able to assess the value of the message presented.”).

109. *Id.*

110. See *id.* at 330.

First Amendment.¹¹¹ The court distinguished the holding from *44 Liquor-mart*:

Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.¹¹²

The Family Smoking Prevention and Tobacco Control Act contains a section banning "outdoor tobacco advertising within 1,000 feet of schools and playgrounds."¹¹³ This section is quite similar to the ordinance passed in Baltimore City. The Act is targeting areas where children, who are not of a legal age to purchase tobacco, are likely to be present. When applying the case law from *44 Liquormart* and *Anheuser-Busch*, it is likely that if a section of the Act banned outdoor advertising where minors only happened to be collateral from the advertiser's message, a court would probably find that section of the bill to be an infringement on First Amendment rights.

E. *Tobacco Companies File Lawsuits*

On August 31, 2009, Reynolds American, Inc., Lorillard, Inc., and other tobacco companies filed a lawsuit in Kentucky to block certain provisions of the Family Smoking Prevention and Tobacco Control Act.¹¹⁴ Tobacco companies are primarily concerned that the law will prevent them from making truthful statements about health risks associated with tobacco products.¹¹⁵ Floyd Abrams, the attorney representing Lorillard Tobacco Company stated, "Tobacco is a legal product for adults, and the Supreme Court has said that the industry has an interest which the First Amendment protects to communicate information about its products, and adults have the right to receive that

111. *Anheuser-Busch*, 101 F.3d at 330.

112. *Id.* at 329.

113. Abrams, *supra* note 12.

114. David Kesmodel et al., *Tobacco Giants Challenge U.S. Law*, WALL ST. J. EUR., Sept 2, 2009, at 31.

115. *Id.*

information.”¹¹⁶ Mr. Abrams, who is a constitutional lawyer, expects the case to proceed quickly.¹¹⁷

“The 46 page complaint seeks declaratory judgments and injunctions against the federal government and officials in the Food and Drug Administration and the Department of Health and Human Services.”¹¹⁸ Mr. Abrams commented that “[t]he case will be about whether Congress has gone too far about preventing tobacco from communicating with adults.”¹¹⁹ The lawsuit is not challenging the provisions that “address tobacco sales to minors.”¹²⁰ Lorillard Tobacco believes that the United States Court of Appeals for the Sixth Circuit “has been more supportive than . . . other circuits [concerning] commercial speech issues.”¹²¹ A district court judge in Kentucky has already struck down certain provisions of the law.¹²² Judge Joseph H. McKinley, Jr. “ruled that the Food and Drug Administration can’t block tobacco companies from using color and graphics in their advertisements” and the tobacco companies cannot be prevented from implying that their products are safer because they are regulated by the FDA.¹²³ Reynolds American is considering whether to appeal the judge’s rulings that favored the government.¹²⁴

V. THE TOBACCO LAW’S EFFECT

A. *Effect on the Tobacco Industry*

Although it is too early to determine the effects the new law will have on the tobacco industry, experts have provided their opinion on the potential impact.¹²⁵ Blake Brown, an agricultural economist who provides analyses and educational programming for tobacco producers, understands factors that affect tobacco demand.¹²⁶ Mr. Brown has worked with various “tobacco industry and health advocates.”¹²⁷ Mr. Brown has provided commentary to support his insight on where the tobacco industry may be heading:

116. Wilson, *supra* note 73.

117. *Id.*

118. *Id.*

119. Kesmodel, *supra* note 114.

120. *Id.*

121. Wilson, *supra* note 73.

122. David Kesmodel & Suzanne Vranica, *Corporate News: Mixed Tobacco Ruling*, WALL ST. J., Jan. 6, 2010, at B2.

123. *Id.*

124. *Id.*

125. See Roan & Yurkiewicz, *supra* note 37.

126. See *id.*

127. *Id.*

"It's very hard to quantify the impact of regulations on the demand for tobacco. But I would think there would be two effects as a result of this legislation. One is, over time, we will see a substantial decline in cigarette consumption. I think the other potential impact is that these regulations call for modified-risk tobacco products. That will change the technology of the way cigarettes are made. These technology changes would likely lead to less tobacco per cigarette. So if you have a decline in the number of cigarettes smoked, and you have a decline in the amount of tobacco used per cigarette, I think that will have a substantial impact on demand for U.S. tobacco. . . . The U.S. tobacco industry has been downsizing for many years, and continued downsizing would be no surprise. But the big question is how stringent these regulations will be. There is a lot of leeway on what can be required. We won't really know the impact until the regulatory agencies start to work on this."¹²⁸

Scott Ramminger, president of the American Wholesale Marketers Association, opposed the legislation due to the cost being driven up on tobacco.¹²⁹ Mr. Ramminger expressed his concerns over what may happen to the cost of tobacco:

"In Canada and other places where draconian regulations have gone in effect, it has basically driven up the cost of the product. Any regulation imposed on any point in the supply chain is going to drive up the cost of the product. You've seen states raise the tax on cigarettes and the federal government has too. What it does is create a great opportunity for organized crime and people interested in subverting the system to bring in bootleg products on the black market. Cigarettes are very easy to make. . . . In California, you've already had a problem with counterfeit cigarettes from China. I understand what the intention of [the legislation] is, and no one is going to quarrel with the idea that smoking is not really good for you. But there are a lot of things that are not good for you that adults choose to do. If an adult chooses to smoke, they are going to find a way to smoke. It would be better for everyone, including the proponents of the legislation, if cigarettes were purchased through a legitimate business. Look at what happened during Prohibition. This, in my mind, is quite similar."¹³⁰

128. *Id.*

129. *Id.*

130. Roan & Yurkiewicz, *supra* note 37 (alteration in original).

Patrick Reynolds, grandson of the founder of R.J. Reynolds Cigarette Company, publicly speaks out against tobacco.¹³¹ His only concern with the Act is that the FDA regulation could remove the electronic cigarette from the market.¹³² An electronic cigarette delivers “vaporized propylene glycol and nicotine solution without tobacco or smoke.”¹³³ Mr. Reynolds emphasized that “the cigarette substitute was very handy to me . . . in quitting smoking. It’s something to suck on and pretend you’re smoking.”¹³⁴ Recently, the FDA tested the electronic cigarette products and found that there were toxic chemicals, including antifreeze.¹³⁵ The FDA’s Deputy Commissioner stated, “Little is known about these products, including how much nicotine is there and what other chemicals may be there.”¹³⁶ Although it is not clear whether the FDA will ban electronic cigarettes altogether under the bill, the FDA did say it is planning additional activities to address issues with the electronic cigarettes.¹³⁷

Menthol, a gateway chemical for kids and young women with smoking, will be exempt from the FDA’s regulation.¹³⁸ Jeffrey Wigand, former vice president for research and development for a major tobacco company, is concerned about the exemption of menthol because it is a cigarette that major cigarette manufacturers have targeted at African Americans for decades.¹³⁹ However, the FDA could still ban menthol under the mandate if it chose to do so.¹⁴⁰ Menthol is favored by twenty-seven percent of all smokers and seventy-five percent of African American smokers.¹⁴¹ Mr. Wigand, who was portrayed by Russell Crowe in the 1999 movie “The Insider,” has become “the tobacco industry’s highest-ranking former executive to address public health and safety.”¹⁴² Mr. Wigand was greatly opposed to Altria—formerly known as Philip Morris—helping negotiate the structure of a bill that was going to regulate them.¹⁴³ The legislation only became possible when Altria supported the law after realizing that regulation of the industry was inevita-

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Matthew Perrone, *FDA Finds Carcinogens in Electronic Cigarettes*, CHARLESTON GAZETTE (W. Va.), July 23, 2009, at A8.

136. *Id.*

137. *Id.*

138. Roan & Yurkiewicz, *supra* note 37.

139. *Id.*

140. Healy, *supra* note 1.

141. *Id.*

142. Roan & Yurkiewicz, *supra* note 37.

143. *Id.*; Kochakian, *supra* note 11.

ble.¹⁴⁴ In general, all new “tobacco products are unlikely to enter the market,” and several products that are already offered are “likely to be pulled.”¹⁴⁵

B. *Will the Legislation Actually Curb Smoking?*

“More than 43 million Americans remain addicted to nicotine in tobacco (indeed, 70% of smokers say they wish they could quit, and 40% try yearly).”¹⁴⁶ Every day, 3500 young people smoke for the first time.¹⁴⁷ Tobacco kills more Americans than AIDS, automobile accidents, cocaine, heroin, homicide, alcohol, and suicide combined.¹⁴⁸ One of the FDA’s new powers is the right to require tobacco companies to release details of research concerning the contents and health effects of their current and future products to the public.¹⁴⁹ Americans will be more aware about the four thousand toxic substances and sixty carcinogens found in tobacco products.¹⁵⁰ Health and consumer groups believe that the bill and other anti-smoking efforts “can significantly reduce the 400,000 deaths and \$100 billion in healthcare costs attributed every year to smoking in the U.S.”¹⁵¹

Smokers in Washington, D.C. were split on whether the new bill actually matters.¹⁵² Reginald Little, a forty-seven year old government researcher, thought the regulation was needed because consumers do not know what exactly is in tobacco products.¹⁵³ Lionel Richardson, a twenty-six year old electrical engineer, called the bill a good thing.¹⁵⁴ He said the tobacco companies’ advertisements “make it sexy so kids think it’s the cool thing to do.”¹⁵⁵ However, there were smokers and non-smokers who did not feel the bill was going to make a difference.¹⁵⁶ A program analyst who smokes cigarettes stated, “I already know it’s bad for me, so I don’t think knowing how much is really in one cigarette is really going to make a difference.”¹⁵⁷ A forty-two year old non-smoking, financial analyst commented that the bill

144. Kochakian, *supra* note 11.

145. Healy, *supra* note 1.

146. *Id.*

147. Kochakian, *supra* note 11.

148. George F. Will, *Burned by a Tobacco Bill*, WASH. POST, June 18, 2009, at A23.

149. Healy, *supra* note 1.

150. *Id.*

151. Abrams, *supra* note 12.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Abrams, *supra* note 12.

157. *Id.*

would lead to “too much government control over personal lives [and] personal choices.”¹⁵⁸ Even though “the FDA will have the authority to adjust” nicotine levels, it cannot bar nicotine altogether.¹⁵⁹ “As a result, the cigarette companies [may be] gaining an even greater degree of governmental approval for the sale of an addictive and deadly product.”¹⁶⁰

C. *The President’s Habit*

President Obama has his own occasional smoking habit that he has been trying to kick since the election.¹⁶¹ The President conceded that the new legislation that is targeted at helping children stop smoking could have helped him when he was younger.¹⁶² The President’s smoking habit has been a kept secret around the White House for some time.¹⁶³ Michelle Obama made it a prerequisite for her husband to quit smoking before he entered the presidential race.¹⁶⁴ However, there is still debate as to whether President Obama has actually kicked his smoking habit.¹⁶⁵ On one hand, his wife claims that he has quit smoking.¹⁶⁶ During an interview with “60 Minutes,” Mrs. Obama claimed, “That’s why he doesn’t do it anymore, I’m proud to say . . . I’m the one who outed him on the smoking. That was one of my prerequisites for, you know, entering this race, is that he couldn’t be a smoking president.”¹⁶⁷

On the day of the bill-signing ceremony, President Obama was asked by a CNN reporter about the President’s struggle with smoking, but the President provided no response.¹⁶⁸ At a press conference that same day, the President’s Press Secretary answered, “He struggles with it every day. I don’t honestly see the need to get a whole lot more specific than the fact that it’s a continuing struggle.”¹⁶⁹ President Obama has admitted that he still struggles

158. *Id.*

159. Kochakian, *supra* note 11.

160. *Id.*

161. Jeff Zeleny, *Occasional Smoker*, 47, *Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15 [hereinafter Zeleny, *Smoker*].

162. *Id.*

163. Jeff Zeleny, *For Obama, Tough Grip by Tobacco*, N.Y. TIMES, June 24, 2009, at A12 [hereinafter Zeleny, *Tough Grip*] (“It was, perhaps, one of the worst-kept secrets around the White House. For weeks, the president’s advisers have declined to say whether he had whipped his smoking habit.”).

164. Zeleny, *Smoker*, *supra* note 161.

165. *See id.*

166. *See id.*

167. *Id.*

168. *Id.*

169. Zeleny, *Smoker*, *supra* note 161.

with his smoking habit.¹⁷⁰ President Obama stated, “You know, I don’t know what to tell you, other than the fact that, you know, like folks who go to A.A., you know, once you’ve gone down this path, then you know it’s something you continually struggle with.”¹⁷¹

Mr. Obama has not been seen smoking publicly for years. In 2005, on his first day in Washington as a freshman senator, he rolled down the window of an SUV and lit up a cigarette as he rode from the Capitol Hill to a meeting at the White House. But now that he is living at the White House, the scrutiny is far higher. So where does he smoke? The wooded grove around the White House swimming pool and tennis court is one place, according to people with knowledge of the matter, who are not authorized to speak about it.¹⁷²

President Obama can set a strong example to the nation’s youth by riding the habit that the bill he signed intends to destroy. Although President Obama is not “the first president to smoke cigarettes,” there is more pressure on him in an era where tobacco is “taboo.”¹⁷³ “[I]mproving health care is at the top of the president’s agenda and a tough anti-tobacco bill has just crossed his desk.”¹⁷⁴ President Obama should not be embarrassed about his smoking habit or why he keeps being asked if he continues to smoke.¹⁷⁵ The President happens to be an excellent spokesman for the new FDA regulation and should embrace the role rather than avoid it.¹⁷⁶ “Obama’s personal difficulty . . . doesn’t only reflect the formidable odds . . . in overcoming nicotine addiction. The [P]resident is living proof to the young people . . . that even the most disciplined among us can become hooked. He is the best conceivable advertisement to counter the tobacco industry’s marketing machine.”¹⁷⁷

170. Zeleny, *Tough Grip*, *supra* note 163.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Marie Cocco, *A Poster Addict for Tobacco Law*, SUNDAY GAZETTE—MAIL (Charleston, W. Va.), June 28, 2009, at C3.

176. *Id.*

The president should make public-service announcements describing his addiction to cigarettes, which he began smoking as a teenager, and his so-far-failed efforts to completely snuff them out. Because after all, if such a smart, smooth and incontestably successful man is having such trouble quitting, what hope is there for the average American who has no worries about a prying press or the negative aura of a nicotine-stained image?

Id.

177. *Id.*

VI. CONCLUSION

The Family Smoking Prevention and Tobacco Control Act is the most important piece of legislation in the last fifty years to place restrictions on the tobacco industry. The FDA for the first time has been given the authority to control what actually goes into tobacco products.¹⁷⁸ Although the new bill was received with tremendous support in both the House and the Senate, there is still debate as to whether the FDA is capable of handling this new mandate. The FDA is still uncertain as to how to implement its newly granted authority “over the advertising, marketing and production of all tobacco products in the U.S.”¹⁷⁹

The FDA’s outreach could validate the views of those who stated that the FDA was already overburdened and was not equipped to undertake the task of regulating the tobacco industry.¹⁸⁰ If the FDA is asking the public for their input on how to implement change under the new Act, then the FDA may not be properly staffed with the people who should be making those kinds of decisions. The FDA has reached out to the public with the following statement:

We are particularly interested in comments on the approaches and actions the agency should consider initially to increase the likelihood of reducing the incidence and prevalence of tobacco product use and protecting the public health. . . . Although the agency will not respond to specific suggestions, we will consider them in establishing the new Center for Tobacco Products and in implementing the [Act]. In the future, we intend to solicit public input on specific issues.¹⁸¹

The FDA’s role is both a blessing and a burden. On the one hand, the Agency has the opportunity to dramatically affect the number of young and older smokers that are affected by tobacco advertising and the contents of tobacco products. “More than 43 million Americans remain addicted to . . . nicotine”¹⁸² and 3500 young people smoke for the first time each day.¹⁸³

178. Abrams, *supra* note 12.

179. Aaron Krivitzky, *FDA Seeks Comment on New Tobacco Regs*, LAWYERS USA (Boston), July 1, 2009.

180. See Abdullah, *supra* note 41.

181. Krivitzky, *supra* note 179 (“Comments can address a large number of issues, including: federal, state, and local government collaboration; new product approval; product ingredient disclosure; advertising and marketing of tobacco products; label statements and warnings; sale and distribution of tobacco products; manufacturing restrictions and facilities controls; and research/testing.”).

182. Healy, *supra* note 1.

However, the Agency also has an incredible amount of pressure to reduce the millions of Americans who are addicted to nicotine, decrease the effect that advertising has on young people, and lower the staggering number of deaths associated with tobacco use. Some of the leading causes of deaths combined do not even amount to as many deaths caused by tobacco.¹⁸⁴

Furthermore, the FDA may face future litigation regarding constitutional issues with the regulations it passes. Prior tobacco and alcohol cases have held complete bans on advertising that are both lawful and truthful in nature may be found unconstitutional under the First Amendment. The law allowing the FDA “to restrict marketing and promotion ‘to the fullest extent permissible’ under the 1st Amendment—a limit that is certain to be tested in future court cases”—enables the Agency to make either complete bans or partial bans on tobacco advertising.¹⁸⁵ Complete bans on tobacco advertising pose a greater risk for a court to strike the regulation down as unconstitutional. Partial bans on advertising, such as those targeted in areas where children are known to be present, suffer a lower chance of being found as unconstitutional.¹⁸⁶

Congress could ban cigarettes; therefore it could ban tobacco advertising. Instead, tobacco advertising and promotions will be even more severely curtailed. These restrictions merit a constitutional challenge. Although commercial speech does not receive full First Amendment protection, Congress should not be allowed to effectively prohibit truthful communication about a legal product.¹⁸⁷

So far, the FDA has not passed any regulations that completely ban tobacco advertising, but the new Act does contain provisions that limit certain elements of commercial speech. If a court finds that parts of the new law or future regulations passed by the FDA do not meet the criteria under the four-step commercial speech analysis, then the provision or regulation will be found unconstitutional.¹⁸⁸ The tobacco companies have already filed lawsuits against the federal government concerning the constitutionality of the Act.

183. Kochakian, *supra* note 11.

184. See Will, *supra* note 148.

185. Healy, *supra* note 1.

186. See Redish, *supra* note 77, at 605.

187. Will, *supra* note 148.

188. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

President Obama has a tremendous opportunity to be spokesperson for the new bill. President Obama needs to take more of a public stance in addressing his tobacco addiction rather than avoiding it when asked about it by the media. If young people can see how a tobacco addiction has become an incredible life struggle for someone as important as the President, they may reconsider trying tobacco altogether.¹⁸⁹ Additionally, health care reform has been at the top of the President's agenda, and he can set a great example by completely getting rid of his smoking habit.

It will certainly take time before the new law starts showing dramatic effects on tobacco use in this country. Furthermore, the Act demonstrates that politicians on Capitol Hill are willing to ignore party lines in order to pass legislation that may dramatically impact the health of American citizens. The Family Smoking Prevention and Tobacco Control Act could be foreshadowing future legislation that will be passed in Washington to curtail industries that are known to create health dangers for American citizens.

189. See Cocco, *supra* note 175.